Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 03-13

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 27, 2003
CERTIORARI GRANTED SEPTEMBER 30, 2003

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APPENDIX A — DOCKET OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case Summary

Court of Appeals Docket #: 01-56003 Filed: 6/7/01
Nsuit: 3370 Other Fraud (Fed)
Altmann, et al v. Republic of Austria, et al
Appeal from: Central District of California, Los Angeles

Lower court information:
District: 0973-2 : CV-00-08913-FMC
presiding judge: Florence Marie Cooper, District Judge

* * *

6/7/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): NO. setting schedule as follows: appellant's designation of RT is due 6/15/01, ; appellee's designation of RT is due 6/25/01; appellant shall order transcript by 7/5/01, ; court reporter shall file transcript in DC by 8/6/01; certificate of record shall be filed by 8/13/01 ; appellant's opening brief is due 9/21/01, ; appellees' brief is due 10/22/01; appellants' reply brief is due 11/5/01, ; [01-56003] (crw) [01-56003]

Appendix A

6/7/01	Filed attorney for Appellant Civil Appeals Docketing Statement served on 6/5/01 (to CONFATT) [01-56003] [01-56003] (crw) [01-56003]
7/3/01	Received copy of transcript designation and ordering form filed in DC (sent to case file) (tm) [01-56003]
7/26/01	Case rejected from Circuit Mediation Program. (sa) [01-10335 01-15735 01-15736 01-15915 01-15976 01-15977 01-15992 01-16017 01-16023 01-16080 01-16104 01-16106 01-16108 01-16111 01-16114 01-16173 01-16176 01-16201 01-16204 01-16210 01-16218 01-16232 01-16240 01-16297 01-16310 01-16326 01-16328 01-16391 01-35542 01-35548 01-35569 01-35583 01-35586 01-35636 01-35661 01-55608 01-55774 01-55816 01-55930 01-55941 01-55942 01-55961 01-55966 01-55982 01-55987 01-56003 01-56013 01-56043 01-56050 01-56080 01-56130 01-70787 01-99008]
8/24/01	Filed Scott P. Cooper for Appellant Austria Gallery, Appellant Republic of Austria Civil Appeals Docketing Statement served on 8/23/01 (to CONFATT) [01-56398, 01-56003] [01-56398, 01-56003] (gva) [01-56003 01-56398]

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8/24/01	Received notice of representation of Jonathan Rich as cs for aplts; served on 8/23/01 (Casefile) [01-56398, 01-56003] (gva) [01-56003 01-56398]
8/30/01	Filed order (A. W. TASHIMA): The Clerk shall consolidate the newly opened appeal w/appeal no. 01-56003. Respondent's mtn to expedite is granted. The brfing sched in appeal no. 01-56003 shall govern the consolidated appeals. The provisions of 9th Cir. R. 31-2.2(a) shall not apply to this brfing sched. [01-56003, 01-56398] (gail) [01-56003 01-56398]
9/4/01	Filed certificate of record on appeal RT filed in DC None requested. [01-56398, 01-56003] (bg) [01-56003 01-56398]
9/24/01	Received Aplts Republic of Austria, Austria Gallery's opening brief in original & 15 copies of 75 pages (Informal: n); 5 Excs.; served on 9/21/01; deficient: (oversized/br is 17,972 words-mtn to file & copy of br sent to Promo) [01-56003, 01-56398] ******* DO NOT USE ********** (gva) [01-56003 01-56398]
9/26/01	Received letter dated 9/24/01 re: . . . On behalf of aple Maria Altma, I am writing to state that we have no objection ot the aplts' mtn to file a longer br of approximately 18,000 words. . . . (Promo) [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

10/9/01	Filed motion & clerk order Promo: (Deputy Clerk: jlc) Aplts' unopposed mtn to exceed the type-volume limitations for the opening br is granted in part. On or before 10/19/01, aplt shall file an opening br that does not exceed 15,400 words. The ans br of equal length is due 11/19/01. The optional rpy br is due 14 days from service of the ans br. (mtn rcvd 9/26/01) [01-56003, 01-56398] (gva) [01-56003 01-56398]
10/12/01	Received original & 15 copies Aple Maria V. Altmann's brief of 63 pages; served on 10/10/01; deficient: (aplt's br not filed yet) [br needs statement of related cases]. Notified csl. (gva) [01-56003 01-56398]
10/18/01	Received Bet Tzedek Legal Services's Amicus Curiae brief in original & 15 copies of 16 pages; in support of aple; deficient: (mtn to becm am pending in Promo w/1 copy of br) served on 10/17/01. [01-56003, 01-56398] ********** FOR MERITS PANEL ********** (gva) [01-56003 01-56398]
10/18/01	Filed Bet Tzedek Legal Services' motion for leave to file brief as amicus curiae in support of aple; served on 10/17/01 ********** FOR MERITS PANEL ********** [4284616] [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

10/22/01	Filed original & 15 copies Aplt's opening brief (Informal: n) 66 pages [15,398 words] & 5 Excs.; served on 10/19/01 [01-56003, 01-56398] (gva) [01-56003 01-56398]
10/22/01	Filed original & 15 copies Aple Maria V. Altmann's 63 pages, served on 10/10/01; minor defcy: (needs Statement of Related Cases) csl previously notified. [01-56003, 01-56398] (gva) [01-56003 01-56398]
10/23/01	Received Aple Maria V. Altmann satisfaction of (minor) brief deficiency: (Statement of Related Cases); served on 10/19/01 (Records). [01-56003, 01-56398] (gva) [01-56003 01-56398]
10/25/01	Received original and 15 copies corrected Amicus curiae brief of Bet Tzedek Legal Services in support of aple of 16 pages; served on 10/24/01 ********** FOR MERITS PANEL ********** [01-56003, 01-56398] (gva) [01-56003 01-56398]
10/26/01	Filed order Promo: (Deputy Clerk: jlc) The mtn of Bet Tzedek Legal Services ("Bet Tzedek") for leave to file an amicus curiae brief, the amicus brief received on 10/18/01, any opposition, and any related filings shall be referred for disposition to the panel that considers the merits of the case. Any further mtns to file an amicus

brief shall be treated in the same fashion. [4284616-1] [01-56003, 01-56398] (gva) [01-56003 01-56398]

10/29/01 Filed Aty Randol Schoenberg for Appellee Maria V. Altmann ltr dated 10/26/01 re: . . . I did not consent to aplt's mtn to extend time to file reply brief . . . (Promo) [01-56003, 01-56398] (gva) [01-56003 01-56398]

10/31/01 Calendar check performed [01-56003, 01-56398] (mw) [01-56003 01-56398]

11/1/01 Filed motion & clerk order Promo: (Deputy Clerk: jlc) . . . The ct is also in receipt of a ltr dated 10/26/01 from csl for aple in response to aplts' mtn for clarification stating his concerns to have briefing completed and to have the appeal resolved as soon as possible. Aplts' alternative request for an ex.tm.f the rpy br is granted. The rpy br is now due 11/5/01. This appeal is deemed ready for calendaring. Aple is reminded that the merits panel will rule on any mtn to become an amicus curiae pursuant to the clerk's 10/26/01 order. (mtn rcvd 10/26/01) [4288460-1] [01-56003, 01-56398] (gva) [01-56003 01-56398]

11/6/01 Filed original & 15 copies Aplts' reply brief (Informal: n) 30 pages; served on 11/5/01 [01-56003, 01-56398] (gva) [01-56003 01-56398]

11/21/01 CALENDARED: Pasadena Feb 5 2002 9:00 a.m. Courtroom 3 [01-56003, 01-56398] (th) [01-56003 01-56398]

12/7/01 Rec'd notice of change of address from E. Randol Schoenberg counsel for Appellee Maria V. Altmann dated 12/13/01. (CASEFILE) [01-56003, 01-56398, 01-80108] (sm) [01-56003 01-56398 01-80108]

1/1/02 Calendar materials being prepared. [01-56003, 01-56398] [01-56003, 01-56398] (aw) [01-56003 01-56398]

1/8/02 CALENDARED: PASA Mar 7 2002 9:00 am Courtroom 3 [01-56003, 01-56398] (aw) [01-56003 01-56398]

2/14/02 Filed order (Deputy Clerk: eu) Bet Tzedek Legal Services' motion for leave to file amicus br is granted. (phoned 10:00 am) [4284616-1] [01-56003, 01-56398] (gva) [01-56003 01-56398]

2/14/02 Filed original & 15 copies Bet Tzedek Legal Services' amicus curiae brief in support of aple of 16 pages; served on 10/17/01. (previously sent to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

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3/7/02	ARGUED AND SUBMITTED TO Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte [01-56003, 01-56398] (rmw) [01-56003 01-56398]
3/20/02	Filed order (Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte): This appeal is referred to the mediation unit to explore a possible resolution through mediation. Submission of this case is vacated until further order of the ct. The mediator should report to the ct every 30 days as to the status of the mediation. The panel is of the view that mediation could bring a resolution that would serve the parties better than results achieved through litigation. mediation unit shall contact the parties directly . . . [01-56003, 01-56398] (gva) [01-56003 01-56398]
4/1/02	Filed order CONFATT (MAC) Pursuant to the referral by the panel, by the order dated 3/20/02, this case is under consideration in the mediation program. A settlement assessment conference will be held by telephone on 4/12/02, at 10:30 am Pacific Time. . . . [01-56003, 01-56398] (gva) [01-56003 01-56398]
4/22/02	Received Aple Maria V. Altmann's additional citations, pursuant to FRAP 28(j); served on 4/19/02 (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

5/9/02	Received E. Randol Schoenberg for Appellee Maria V. Altmann letter dated 5/7/02 re: . . . Could you please let me know whether the case has in fact been re-submitted to the panel for decision? (Confatt(and PANEL ON 5/20/02) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/24/02	Filed order (Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte): This case is ordered resubmitted. [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/24/02	Case resubmitted on this date to Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte. (See previous deferral of submission.) Order filed: 5/24/02. [01-56003, 01-56398] (gva) [01-56003 01-56398]
7/1/02	Received Aples' additional citations, pursuant to Rule 28(j); served on 6/28/02 (Panel) [01-56398, 01-56003] (gva) [01-56003 01-56398]
8/12/02	Rec'd notice of change of firm name from E. Randol Schoenberg for Appellee Maria V. Altmann. New name: BURRIS & SCHOENBERG, LLP 12121 Wilshire Blvd., Suite 800, Los Angeles CA 90025; served on 8/8/02 (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

9/13/02	Filed Maria V. Altmann's additional citations, pursuant to FRAP 28(j); served on 9/12/02 (Panel) (gva) [01-56003 01-56398]
10/3/02	Filed Aple Maria V. Altmann's additional citations, pursuant to FRAP 28(j); served on 10/1/02 (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]
11/20/02	Copy of letter received from Maria V. Altmann addressed to Judge Florence Marie Cooper re: . . . status of appeal (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]
12/12/02	FILED OPINION: AFFIRMED AND REMANDED. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Kim M. WARDLAW, author; William A. FLETCHER; Ronald M. Whyte) FILED AND ENTERED JUDGMENT. [01-56003, 01-56398] (gva) [01-56003 01-56398]
12/20/02	Filed Aplts' motion to ex.tm.f a petition for panel rehearing and rehearing en banc; declaration of Jonothan Rich; [30 days] served on 12/19/02 (Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

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12/23/02	Filed order (Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte,): The motion by aplts to extend the time to file a petition for panel rehearing and rehearing en banc is hereby DENIED. (PHONED OUT 4:30) [01-56003, 01-56398] (hh) [01-56003 01-56398]
12/23/02	Received letter from attorney E. Randol Schoenberg for Appellee Maria V. Altmann letter dated 12/17/02 re: opposing appellant's request for an extension of time to file petition for rehearing. (PANEL by fax) [01-56003, 01-56398] (ru) [01-56003 01-56398]
12/24/02	Filed Appellant Republic of Austria, Austria Gallery motion to extend time to file petition for rehearing and rehearing en banc pursuant to General Order 6.3a; served on 12/23/02 [4613903] [01-56003, 01-56398] (ru) [01-56003 01-56398]
12/24/02	Filed order (Deputy Clerk: ru) The court sua sponte grants appellants' motion for a 7 day extension of time to file a petition for rehearing or rehearing en banc; petition due 1/2/03. [01-56003, 01-56398] (ru) [01-56003 01-56398]
12/26/02	Filed Appellee Maria V. Altmann's bill of costs $69.75; served on 12/24/02 [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

1/2/03	[4618718] Filed original & 50 copies Aplts' petition for panel rehearing and petition for rehearing en banc of 17 pages [4,164 words]; served on 12/31/02 (Panel And All Active Judges) [01-56003, 01-56398] (gva) [01-56003 01-56398]
1/2/03	Filed Aplts' request for judicial notice in support of their petition for panel rehearing with suggestion for rehearing en banc; [filed concurrently with petition for panel rehearing with suggestion for rehearing en banc]; served on 12/31/02 (Panel And All Active Judges) [01-56003, 01-56398] (gva) [01-56003 01-56398]
1/6/03	Filed appellee Maria V. Altmann's motion to dismiss untimely petition for panel rehearing with suggestion for rehearing en banc and for issuance of mandate; served on 1/3/03 [4620948] (to PANEL) (hh) [01-56003 01-56398]
1/7/03	Filed (faxed) Aplts' opposition to aple's motion to dismiss untimily petition for panel rehearing with suggestion for rehearing en banc and for issuance of mandate; declaration of Joanathan E. Rich; served on 1/7/03 (faxed to Panel) [4620948-1] [01-56003, 01-56398] (Orig. rcvd 1/8/03) (gva) [01-56003 01-56398]
1/9/03	Filed order (Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte): Judge Tashima ordered this matter expedited on 8/30/01.

Appendix A

We filed our decision affirming the dc on 12/12/02 and unanimously denied the motion by aplts to extend the time to file a petition for panel rehearing and rehearing en banc on 12/23/02, which motion requested an extendion of the 12/26/02 deadline to 1/27/03. The clerk of the 9th Circuit CA thereafter on 12/24/02 granted 7-day ex.tm pursuant to Gen. Order 6.3(a). The aplts filed their petition for pandl rehearing with suggestion for rehearing en banc on 1/2/03, which was the last day for filing according to the ex.tm granted by tne clerk. The aple correctly argues that the clerk's granting of a 7-day ex.tm. violated the spirit, if not the letter, of Judge Tashima's order expediting the appeal and certainly conflicted with our denying the extension of time. Nevertheless, when an aplt timely requests an ex.tm, is informed by the clerk that the ex.tm has been granted, and, relying upon the representation of the clerk of the court, delays filing until after the original deadline has passed, the enforcement of the original deadline would be harsh and unfair. In any event the aplts "Petition for Panel Rehearing with Suggestion for Rehearing En Banc" has been circulated to the enire court and it would be appropriate for the aple to have an opportunity to respond. Accordingly, we deny the aple's Motion to Dismiss Unitimely Petition For Panel Rehearing with Suggestion For Rehearing En Banc and for Issuance of Mandate, and order the aple to respond to the aplts' petition on or before 1/30/03. No further ex.tm will be

granted in this matter, including in any and all future proceedings. The aple's motion is hereby DENIED. (phoned/faxed) [4620948-1] in 01-56003, 01-56398 [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/10/03 Filed USA's letter dated 1/9/03 treated as motion to become amicus; served on 1/9/03 (faxed to Panel) [4625174] [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/14/03 Received original & 50 copies USA amicus curiae brief of 18 pages; deficient: (mtn to becm am pending); served on 1/13/03. (faxed/fed.ex to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/14/03 Filed USA's motion for leave to file brief as amicus curiae in support of petition for rehearing and suggestions for rehearing en banc; served on 1/13/03 (faxewd to Panel) [4627807] [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/17/03 Filed order (Deputy Clerk: hh) The mtn of the USA for leave to file brief as amicus curiae in support of petition for rehearing and suggestion for rehearing en banc is granted. in 01-56398, 01-56003 [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/17/03 Filed original & 50 copies USA's amicus curiae brief in support of petition for rehearing en banc of 18 pages; served on 1/13/03 (TO ALL ACTIVE JUDGES/PANEL WAS PREVIOUSLY SERVED) [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/28/03 Filed Aple's response to aplt's petition for enbanc rehearing of 15 pages; served on 1/27/03 (Panel And All Active Judges) [01-56003, 01-56398] (gva) [01-56003 01-56398]

3/19/03 Received Appellee Maria V. Altmann in 01-56003 01-56398 and 01-80108 letter dated 3/14/03 requesting the status of the petition for rehearing. served on 3/14/03 (notified aplt rehearing pending) [01-56003, 01-56398, 01-80108] (vt) [01-56003 01-56398 01-80108]

4/23/03 Received Maria V. Altmann's additional citations, pursuant to FRAP 28(j); served on 4/21/03 [01-56003, 01-56398] (gva) [01-56003 01-56398]

4/28/03 Received Maria V. Altmannt's additional citations, pursuant to FRAP 28(j); served on 4/24/03 (Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

4/28/03	Filed order (Kim M. WARDLAW, William A. FLETCHER, White): The opinion filed 12/12/02 . . . is amended as follows . . . The petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for rehearing will be entertained. [4618718-1] in 01-56003, 01-56398 [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/2/03	Filed Aplts Republic of Austria, Austria Gallery motion to stay the mandate; served on 5/2/03 (KMW) [4726750] [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/6/03	Filed Aple Maria V. Altmann's opposition to motion to stay issuance of mandate; served on 5/2/03 (KMW) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/6/03	Filed order (Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte): The Motion by Appellants to Stay the Issuance of the Mandate is hereby DENIED. [01-56003, 01-56398] (ru) [01-56003 01-56398]
5/9/03	Received Aplts' copy of motion to stay the mandate of USCA for the Ninth Circuit pending certiorari [filed in USSC]; served on 5/8/03 (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]

5/13/03	Filed Supreme Court order (SC Date: 5/13/03) It is ordered that the mandate of the USCA for the Ninth Circuit, case Nos. 1-56003 and 1-56398 be, and the same is hereby, stayed pending receipt of a response and further order of the undersigned court. [Sandra Day O'Connor Associate Justice of the USSC] (Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/16/03	Received courtesy copy of petitioners' reply in suport of their application to stay mandate filed in the USSC; served on 5/15/03 (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/16/03	Received Respondent Maria Altmann's opposition to application to stay mandate; served on5/14/03 [filed in the USSC] (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/16/03	Received petitioner's proof of service of USSC's 5/13/03 order on USCA (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/19/03	Filed Faxed Supreme Court order (SC Date: 5/19/03) The application for a stay of mandate presented to Justice O'Connor and by her referred to the Court is granted pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be

denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

5/19/03 Filed Supreme Court order (SC Date: 5/13/03) Upon consideration of the application of counsel for the applicant. It is ordered that the mandate of the USCA for the Ninth Circuit, case Nos. 1-56003 and 1-56398, be and the same is hereby, stayed pending receipt of a response and further order of the undersigned or of the court. [Sandra Day O'Connor Associate Justice of the USSC]. (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

5/19/03 Copy of letter dated 5/15/03 received from Maria V. Altmann addressed to Troy D. Cahill office of USSC re: . . . to correct several misstatements made by petitioners in their reply br. . . . (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

5/27/03 Filed Supreme Court order (SC Date: 5/19/03) The appl for a stay of mandate presented to Justice O'Connor and by her referred to the Court is granted pending the disposition of the petition for a writ of cert. Should the pet for a writ of cert be denied, this stay shall terminate automatically. In the event the pet for writ of cert

is granted, the stay shall terminate upon the sending down of the judgment of this ct. PANEL [01-56003, 01-56398] (gar) [01-56003 01-56398]

7/7/03 Received letter from the Supreme Court dated 7/1/03 re: The petition for a writ of certiorari in the above entitled caee was filed on 6/27/03 and placed on the docket 7/1/03 as No. 03-13 (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]

7/8/03 Received from Scott Cooper aty for Aplts Republic of Austria & Austria Gallery letter dated 7/2/03 re: . . . timely filed their petition for writ of certiorari with SC on 6/27/03 (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]

10/6/03 Received letter from the Supreme Court dated 9/30/03 re: The court today entered the following order in the above entitiled case. The petition for a writ of certiorari is granted limited to question one presented by the petition. (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

APPENDIX B — DOCKET OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

U.S. District Court

Central District of California (Western Div.)

CIVIL DOCKET FOR CASE #: 00-CV-8913

Maria V Altmann v. Republic of Austria, et al

Filed: 08/22/00
Assigned to: Judge Florence-Marie Cooper
Referred to: Discovery Ann I. Jones
Demand: $150,000,000
Nature of Suit: 370
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 31:3731 Fraud

MARIA V ALTMANN, an individual
plaintiff

E Randol Schoenberg
FAX 310-442-0353
[COR LD NTC]
Burris & Scheonberg
12121 Wilshire Blvd, Ste 800
Los Angeles, CA 90025-1171
310-442-5559

Appendix B

v.

REPUBLIC OF AUSTRIA, a Foreign state
defendant

Scott P Cooper
FAX 310-557-2193
[COR LD NTC]
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AUSTRIAN GALLERY, an agency of the Republic of Austria
defendant

Scott P Cooper
(See above)
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Appendix B

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MARIA V ALTMANN, an individual
plaintiff

v.

REPUBLIC OF AUSTRIA, a Foreign state; AUSTRIAN GALLERY, an agency of the Republic of Austria
defendant

BET TZEDEK LEGAL SERVICES
amicus

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DOCKET PROCEEDINGS

Date	#	Docket Entry
8/22/00	1	COMPLAINT filed Summons(es) issued referred to Discovery Ann I. Jones (jag) [Entry date 08/25/00]
8/22/00	2	CERTIFICATION OF INTERESTED PARTIES filed by plaintiff Maria V Altmann (jag) [Entry date 08/25/00]
8/22/00	—	ORIGINAL SUMMONS issued as to defendant Republic of Austria, a foreign state & Austrian Gallery, an agency of the Republic of Austria (yl) [Entry date 10/04/00] [Edit date 10/04/00]
9/22/00	3	EX PARTE APPLICATION filed by plaintiff for issuance of letters rogatory & amd of sms Lodged Request; Let Rog issd on 10/19/00 (rrey) [Entry date 09/25/00] [Edit date 10/19/00]
12/12/00	4	CERTIFICATION AS TO INTERESTED PARTIES filed by defendant Republic of Austria, defendant Austrian Gallery (rrey) [Entry date 12/13/00]
12/12/00	5	EX PARTE APPLICATION filed by defendants for an Ord extending time w/in which to resp to cmp; decl of Jonathan E Rich; Lodged Propsd Ord (rrey) [Entry date 12/14/00]

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12/14/00	6	ORDER by Judge Florence-Marie Cooper granting exparte appl for an Ord extending time w/in which to resp to cmp [5-1]; dfts shall resp to the cmp on or before 1/22/01 (rrey) [Entry date 12/15/00]
12/14/00	7	OPPOSITION by plaintiff to exparte appl for an Ord extending time w/in which to resp to cmp [5-1]; decl of E Randol Schoenberg (rrey) [Entry date 12/18/00]
1/5/01	8	STIPULATION and ORDER by Judge Florence-Marie Cooper extending time to answer complaint [1-1] to 2/5/01 as to defendants Republic of Austria, Austrian Gallery (rrey) [Entry date 01/08/01]
1/10/01	9	CERTIFICATION of an Executed Letter Rogatory by James D Pettit, Consul General of the USA (rrey) [Entry date 01/16/01]
1/31/01	10	STIPULATION and ORDER by Judge Florence-Marie Cooper that the briefing schedule on dfts motion to dismiss shall be as fols: (1) Dfts mot to dism shall be fld on/before 2/5/01; (2) plf's opp shall be fld on/before 2/26/01; (3) Dfts Reply shall be fld on/before 3/12/01; & Hrg on the mtr shall be ntc for 3/19/01 @ 10:00 or such other date as the Crt deems proper. (jp) [Entry date 02/02/01]

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2/5/01	11	NOTICE OF MOTION AND MOTION by defendants to dismiss cmp ; motion hearing set for 10:00 3/19/01 (rrey) [Entry date 02/06/01]
2/5/01	12	DECLARATION of Dr Walter Friedrich by defendants in suppt of motion to dismiss cmp [11-1] (rrey) [Entry date 02/06/01]
2/8/01	13	NOTICE OF ERRATA by defendants to motion to dismiss cmp [11-1] (rrey) [Entry date 02/09/01]
2/21/01	14	SUPPLEMENTAL MEMO by defendants re motion to dismiss cmp [11-1] (rrey) [Entry date 02/22/01]
2/26/01	15	PROOF OF SERVICE by Amicus Curiae Bet Tzedek Legal Services on 2/26/01 of Ex Parte Appl for leave to file brief in Opp to Mot to Dism; Memo PA in suppt of Plfs Opp to Dfts Mot; Decl of Janie F Schulman in suppt of Ex Parte Appl; Decl of David A Lash in suppt of Ex Parte Appl; [Proposed] Ord (dw) [Entry date 02/27/01]
2/26/01	16	MEMO OF P&A IN OPPOSITION by plaintiff Maria V Altmann to motion to dismiss cmp [11-1] (bg) [Entry date 02/27/01]

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2/26/01	17	DECLARATION of Dr Stefan Gulner by plaintiff Maria V Altmann in opp re motion to dismiss cmp [11-1] (bg) [Entry date 02/27/01]
2/26/01	18	DECLARATION of E Randol Schoenberg by plaintiff Maria V Altmann in opp re motion to dismiss cmp [11-1] (bg) [Entry date 02/27/01]
2/26/01	19	EX PARTE APPLICATION filed by amicus curiae Bet Tzedek Legal Svc for leave to file brief in opp to mot to dism; Lodged propsd ord (rrey) [Entry date 02/27/01]
2/26/01	20	MEMORANDUM OF P/A IN SUPPORT by amicus Bet Tzedek Legal Svc of exparte appl for leave to file brief in opp to mot to [19-1] (rrey) [Entry date 02/27/01]
2/26/01	21	DECLARATION of David A Lash by amicus Bet Tzedek Legal Svc in suppt of exparte appl for leave to file brief in opp to mot to dism [19-1], & in suppt of brief in opp to motion to dismiss cmp [11-1] (rrey) [Entry date 02/27/01]
2/26/01	22	DECLARATION of Janie F Schulman by amicus Bet Tzedek Legal Svc in suppt of exparte appl for leave to file brief in opp to mot to dism [19-1] (rrey) [Entry date 02/27/01]

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2/27/01	23	ORDER by Judge Florence-Marie Cooper granting exparte appl for leave to file brief in opp to mot to dism [19-1] (rrey) [Entry date 02/28/01]
2/28/01	24	RESPONSE by defendants to exparte appl for leave to file brief in opp to mot to dism [19-1] (rrey) [Entry date 03/01/01]
3/5/01	25	COUNTER-STATEMENT IN OPPOSITION by defendants' Republic of Austria, Austrian Gallery to notice of related case. (bp) [Entry date 03/06/01]
3/12/01	26	REPLY Memo of points & authorities by defendant Republic of Austria, defendant Austrian Gallery in support of motion to dismiss cmp [11-1] (bp) [Entry date 03/13/01]
3/12/01	27	DECLARATION of Dr. Walter Friedrich by defendant Republic of Austria, defendant Austrian Gallery in support of motion to dismiss cmp [11-1] (bp) [Entry date 03/13/01]
3/14/01	28	MINUTES: The crt, on its own mot, hereby continues the hearing on motion to dismiss cmp [11-1] 10:00 4/30/01 by Judge Florence-Marie Cooper CR: N/A (bp) [Entry date 03/15/01]

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3/14/01	29	PROOF OF SERVICE by defendant Republic of Austria on 3/13/01, of dfts' reply memo of points and authorities. (bp) [Entry date 03/15/01]
4/30/01	30	Plaintiff Maria Altmann's suggested corrections to tentative order denying defendants' motion to dismiss. (bp) [Entry date 05/01/01]
4/30/01	31	MINUTES: The motion to dismiss cmp [11-1] is taken under submission, final order to issue by Judge Florence-Marie Cooper CR: Pat Cuneo (bp) [Entry date 05/02/01]
5/2/01	32	RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 4/30/01 CR: Pat Cuneo (dl) [Entry date 05/03/01]
5/2/01	—	TRANSCRIPT filed for proceedings held on 4/30/01 (dl) [Entry date 05/03/01]
5/4/01	33	ORDER denying defendant's motion to dismiss. Plaintiff is granted fifteen (15) days' leave to amend the complaint to set forth the basis for venue pursuant to 1391(f)(3), by Judge Florence-Marie Cooper denying motion to dismiss cmp [11-1] (ENT 5/7/01) (sent) (bp) [Entry date 05/07/01]

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5/8/01 34 REQUEST by defendant Republic of Austria for clarification of order denying defendants' motion to dismiss and certifying issues for appeal. (bp) [Entry date 05/09/01]

5/9/01 35 MINUTES: On 5/8/01, defendants filed a request for clarification of the court's 5/4/01, order denying dfts' mot to dism. The final section, section IX, of the court's 5/4/01, order denying defendant's mot to dismiss is hereby amended to read: Conclusion for the reasons stated herein, defendant's mot to dismiss is denied. Plaintiff is granted fifteeen (15) days' leave to amend the complaint to set forth the bases for venue by Judge Florence-Marie Cooper CR: N/A (bp) [Entry date 05/11/01]

6/5/01 36 NOTICE OF APPEAL/REPRESENTATION STATEMENT by defendant Republic of Austria, a foreign state, defendant Austrian Gallery, an agency of the Republic of Austria to 9th C/A from Dist. Court ord fld 5/4/01 & ent 5/7/01 [33-1] (cc: xScott P. Cooper, E. Randol Schoenberg, Morrison & Foerster) Fee: Paid (dl) [Entry date 06/06/01]

6/5/01 37 PROOF OF SERVICE by defendant Republic of Austria, defendant Austrian Gallery (dl) [Entry date 06/06/01]

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7/2/01 38 TRANSCRIPT DESIGNATION and ordering form for dates: 4/30/01 re transcript [32-1] CR: P. Cuneo. (fvap) [Entry date 07/11/01]

7/11/01 39 CERTIFICATE of Record Transmitted to USCA (01-80108) (cc: all parties) (pjap) [Entry date 07/11/01]

7/16/01 40 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [36-1] 01-56003 (dl) [Entry date 07/16/01]

7/19/01 41 AMENDED CERTIFICATE of Record Transmitted to USCA (01-56003) (cc: all parties) (pjap) [Entry date 07/19/01]

8/20/01 42 CC ORDER FROM USCA: Petn for permission to app purs to 28 U.S.C. Section 1292(b) is GR. W/in 10 days of this ord, petrs shall perfect app purs to FRAP 5(d). Upon petrs' compliance w/this ord & docketing of new app, Clerk shall consol newly opened app w/app no. 01-56003. Resp's mot to expedite is GR. Briefing sched in app no. 01-56003 shall govern consol apps. Provisions of 9th Circuit Rule 31-2.2(a) shall not apply to this briefing sched. Clk shall cal consol apps on next available cal after completion of briefing. (01-80108) (01-56398) (pjap) [Entry date 08/21/01] [Edit date 08/24/01]

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8/23/01 — Appeal Fee Paid re [42-1] fee in amount of $105.00. (01-56398) (wdc) [Entry date 08/23/01] [Edit date 08/24/01]

8/30/01 43 NOTICE of No Transc Designated or Ord for C/A for the 9th Circuit Docket # 01-56398 (Consol w/ 01-56003). (wdc) [Entry date 08/31/01]

8/31/01 44 CERTIFICATE of Record Transmitted to USCA - 01-56398; 01-56003 (cc: all parties). (wdc) [Entry date 08/31/01]

11/5/01 45 ORDER FROM USCA: Applnt's alternative req for an ext of time to fl reply is GR. Reply brief is due 11/05/01. (cbr) [Entry date 11/09/01]

12/19/01 46 NOTICE OF CHANGE Of Address filed by atty E Randol Schoenberg for plaintiff Maria V Altmann; New address reflect a new suite # & ne 9-digit zip code; 12121 Wilshire Blvd, Ste 800, Los Angeles, CA 90025-1168. (nhac) [Entry date 12/20/01]

2/8/02 47 CLERK'S record on appeal transmitted to Circuit [36-1] vols: 2;transcripts: 1 & brown folder doc # 12. (not included doc# 11) 01-56003 & 01-56398 (ghap) [Entry date 02/08/02]

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2/19/02 48 ORDER FROM USCA Bet Tzedek Legal Services'mot for leave to file amicus brief is GR. 01-56003,01-56398 (ghap) [Entry date 02/22/02]

3/25/02 49 ORDER FROM USCA app is ref to the mediation unit to explore a possible resolution through mediation. Submission of this case is vac until fur ord of the crt. 01-56003 & 01-56398 (ghap) [Entry date 03/27/02]

4/4/02 50 ORDER FROM USCA a sttlmnt assessmant conf will be held by telephone on 4/12/02, at 10:30 a.m. PACIFIC Time. 01-56003 & 01-56398 (ghap) [Entry date 04/08/02]

6/20/02 51 MINUTES: The court orders parties to file a joint report as to the status of the appeal within 10 days from the date of this order by Judge Florence-Marie Cooper CR: N/A (bp) [Entry date 06/20/02]

6/25/02 52 JOINT REPORT as to status of appeal filed (bp) [Entry date 06/26/02]

8/9/02 53 NOTICE OF CHANGE Of Firm Name filed by atty E Randol Schoenberg for plaintiff Maria V Altmann that Lawfirm name has changed to Burris & Schoenberg, LLP, 12121 Wilshire Blvd, Ste 800, Los Angeles, CA 90025; Telephone No.: 310-442-5559; Fax No.: 310-442-0353. (jp) [Entry date 08/12/02]

1/14/03 54 ORDER FROM USCA: we deny the appellee's motion to dismiss untimely petition for panel rehearing with suggestion for rehearing En Banc & for issuance of Mandate, & order the the appellee to respond to the appellants' petition on or before 1/30/03. No further extensions of time will be granted in this matter, including in any & all future proceedings. The appellee's motion is hereby denied. (01-56003, 01-56398) (weap) [Entry date 01/16/03]

1/21/03 55 ORDER FROM USCA: Motion of United States of America for Leave to File Brief as Amicus Curiae in Support of Petition For Rehearing and Suggestion of Rehearing En Banc granted. (01-56003, 01-56398) (pjap) [Entry date 01/23/03]

5/14/03 56 NOTICE OF DISCREPANCY AND ORDER by Judge Florence-Marie Cooper ordering proof of service of order of the Supreme Court submitted received on 5/14/03 is not to be fld but instead rejected (bp) [Entry date 05/16/03]

5/14/03 58 RECORD on appeal returned from U.S. Court of Appeals re appeal [36-1] vols: 1 thru 2; transcripts: 1; brown folders: 1, document number 12. (cbr) [Entry date 06/25/03]

5/16/03 57 NOTICE OF DISCREPANCY AND ORDER by Judge Florence-Marie Cooper ordering reply in support of applicatio submitted received on 5/16/03 to be fld and processed; fld date to be the date the doc was stamped "received but not fld" w/the Clerk (bp) [Entry date 05/21/03]

6/25/03 59 NOTICE of Clerical Error and Correction of Scanned Document. You are hereby notified that due to a clerical error, the following scanned document has been corrected as indicated below. The notice of discrepancie, filed on May 5, 2003. The date received has been changed from 5/14/02 to 5/14/03. (bp) [Entry date 06/25/03]

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED DECEMBER 12, 2002 AND AMENDED ON APRIL 28, 2003†

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 01-56003, 01-56398

Maria V. ALTMANN, an individual,

Plaintiff-Appellee,

v.

REPUBLIC OF AUSTRIA, a foreign state; and the Austrian Gallery, an agency of the Republic of Austria,

Defendants-Appellants.

Argued March 7, 2002.
Submitted May 24, 2002.
Decided Dec. 12, 2002.

Before: *WARDLAW, W. FLETCHER*, Circuit Judges and *WHYTE*,* District Judge.

WARDLAW, Circuit Judge.

At issue is whether the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, confers jurisdiction in the United

† Amendments appear in brackets [ ].

* The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

Appendix C

States District Court for the Central District of California over the Republic of Austria and the state-owned Austrian Gallery in a suit alleging wrongful appropriation of six Gustav Klimt paintings from their rightful heirs. Maria Altmann, a United States citizen, seeks the recovery of the paintings from the Republic of Austria, which now houses them in the Austrian Gallery. She alleges that (i) the Nazis took the paintings from her Jewish uncle to "Aryanize" them in violation of international law; (ii) the pre-World War II and wartime Austrian government was complicit in their original takings; (iii) the current government, when it learned of the heirs' rights to the paintings, deceived the heirs as to the circumstances of its acquisition of the paintings; and (iv) the Republic and the Gallery now wrongfully assert ownership over the paintings. The Republic of Austria appeals from the district court's denial of its motion to dismiss for want of jurisdiction. Rejecting the Austrian Republic's assertions, the district court found, *inter alia*, that the FSIA applied retroactively and generally to the events of the late 1930s and 1940s, and that the seizure of the paintings fell within the expropriation exception to the FSIA's grant of immunity.

For the reasons stated below, we determine that the exercise of jurisdiction in this case does not work an impermissible retroactive application of the FSIA. If true, the facts alleged by Altmann establish a taking in violation of international law that confers jurisdiction upon our federal courts, and thus Altmann has presented a substantial and nonfrivolous claim. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992) ("At the jurisdictional stage, we need not decide whether the taking actually violated international law; as long as a 'claim is substantial and nonfrivolous, it provides a sufficient basis for the exercise of our jurisdiction.' " (quoting *West v.*

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Multibanco Comermex, S.A., 807 F.2d 820, 826 (9th Cir. 1987))), *cert. denied*, 507 U.S. 1017, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993). Because Appellants profit from the Klimt paintings in the United States, by authoring, promoting, and distributing books and other publications exploiting these very paintings, these actions are sufficient to constitute "commercial activity" for the purpose of satisfying the FSIA, as well as the predicates for personal jurisdiction. Finally, because the Republic of Austria "does business" in the Central District of California, venue is appropriate there and the principles of *forum non conveniens* do not counsel otherwise. Thus we uphold the district court's assertion of jurisdiction under the FSIA.

I. Background

In the early 1900s Ferdinand Bloch, a wealthy Czech sugar magnate, commissioned a portrait of his young wife, Adele Bloch-Bauer, by the Austrian painter Gustav Klimt. Adele and Ferdinand, members of the wealthy Viennese intellectual elite, commissioned Klimt's painting at a time when the artist commanded a fee in excess of a quarter of the price of a furnished country villa. Klimt made hundreds of sketches of Adele, culminating in 1907 with the shimmery golden portrait, *Adele Bloch-Bauer I*. Before Adele's untimely passing in 1925, she owned six Klimt paintings, including another portrait of herself, a portrait of a close friend, and three landscapes: *Adele Bloch-Bauer I & II*, *Amalie Zuckerkandl*, *Apple Tree I*, *Beechwood*, and *Houses in Unterach am Attersee*. Obviously oblivious to the terror to come, which would dramatically affect Austria generally and her husband Ferdinand intimately, Adele left a will "kindly" requesting that Ferdinand donate the paintings to the Austrian Gallery upon his death.

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The Nazi invasion of Austria on March 12, 1938, worked a dramatic upheaval on the lives of Ferdinand and all Austrians. Many of the Austrians embraced the Nazis, moving Adolf Hitler to declare the *Anschluss*—the annexation of Austria to Nazi Germany—the next day. To imbue these actions with a quasi-legal basis, a mock Council of Ministers was convened, which adopted the resolution for the *Anschluss*. The legitimate Austrian cabinet leaders were arrested and deported to concentration camps. The country was split into single districts under the direct control of Berlin. Even the name "Austria" was abolished. Ferdinand, who was Jewish and had supported anti-Nazi efforts before the annexation of Austria, fled the country to avoid persecution, leaving behind all his holdings, including his paintings, a valuable porcelain collection, and his beautiful home, castle, and sugar factory. He settled in Zurich, Switzerland.

In the meantime, Nazi officials, accompanied by representatives of what later became the Austrian Gallery, convened a meeting to divide up Ferdinand's property. His sugar company was "Aryanized" and his Vienna home was reduced to a German railway headquarters. Reinhardt Heydrich, the author of the infamous Final Solution, moved into Ferdinand's castle. Ferdinand's vast porcelain collection was sold at a public auction, with the best pieces going to Vienna's museums. Hitler and Hermann Göring confiscated some of Ferdinand's Austrian Masters paintings for their private collections. Others were bought for Hitler's planned museum at Linz. Dr. Erich Fuerher, the Nazi lawyer liquidating the estate, chose a few paintings for his personal collection. Dr. Fuerher purported to give two of the paintings at issue, *Adele Bloch-Bauer I* and *Apple Tree I*, to the Austrian Gallery in 1941, in exchange for a painting donated by Ferdinand in 1936. He accompanied the transaction with a note

claiming to deliver the paintings in fulfillment of the last will and testament of Adele and signed it "Heil Hitler." In March 1943, Dr. Fuerher sold *Adele Bloch-Bauer II* to the Gallery and *Beechwood* to the Museum of the City of Vienna. He kept *Houses in Unterach am Attersee* for his personal collection. It is not clear what immediately happened to *Amalie Zuckerkandl*, although it ended up in the hands of the art dealer Vita Künstler.

Ferdinand died in Switzerland in November 1945. He left a will, revoking all prior wills, and leaving his entire estate to one nephew and two nieces, including Maria Altmann. Like Ferdinand, Altmann and her husband had been forced to flee Austria. When the Nazis invaded Austria, they imprisoned her husband Fritz in the labor camp at Dachau and moved Altmann to a guarded apartment. Her brother-in-law managed to get Fritz released from Dachau, after which they escaped to Holland. Ultimately, they ended up in Hollywood, California, where Altmann became a United States citizen in 1945.

Also in 1945, the Second Republic of Austria was born and the next year, it declared that all transactions motivated by the Nazis were void. Despite this official policy, Altmann and her family members were unsuccessful in recovering the Klimt paintings. Altmann's brother could retrieve only *Houses in Unterach* from the private collection of Dr. Fuehrer. In December 1947, the Museum of the City of Vienna offered to return the painting *Beechwood*, but only in exchange for a refund of the purchase price. This offer was rejected by Ferdinand's heirs. The heirs then unsuccessfully sought return of three of the paintings from the Gallery; the Gallery refused to transfer the paintings, asserting that they had been bequeathed to it by the terms of

Adele's will. Under color of the will, the legal effect of which has yet to be determined,[1] the museum even began to prepare suit for return of the Klimt paintings not yet in its possession. Despite the museum's aggressive stance, a private letter from Dr. Karl Garzarolli dated March 8, 1948, of the Gallery to his Nazi-era predecessor revealed that nothing in the files of the Gallery would document the donation of the paintings to the Gallery. This letter was kept hidden from Ferdinand's heirs.

In 1948, an agent of Austria's Federal Monument Agency contacted Dr. Rinesch, the Austrian lawyer hired by the family, to discuss the artworks in question. He informed Dr. Rinesch that the artworks could not be exported without resolution of their ownership. In a practice later declared illegal by the Austrian government, the Agency informed Dr. Rinesch that it would grant export permits on some of the family's other recovered artworks in exchange for a "donation" of the Klimt paintings. With little hope of otherwise exporting the other artworks, Dr. Rinesch agreed that Ferdinand's heirs would acknowledge the will of Adele Bloch-Bauer and allow the Austrian Gallery to keep the six Klimt paintings mentioned in the will. He justified this decision to Robert Bentley, Altmann's brother, by claiming that Adele's will would be sufficient to give the museum a claim to the six paintings. He executed a document, dated April 12, 1948, acknowledging the agreement and gave *Houses in Unterach* to the Austrian Gallery. As agreed, Dr. Rinesch obtained export permits for almost all of the other recovered artworks.

1. Altmann contends that under both Austrian and American law, precatory language such as that set forth in Adele's last will and testament kindly asking another to bequeath his property is unenforceable and ineffective to dispose of that property. To be effective, the will must contain a command or order as to the disposition of property.

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In early 1998, an international art scandal broke: the City of New York seized two Egon Schiele paintings loaned by Austria to the Museum of Modern Art in New York, claiming that they were stolen by the Nazis. In response to allegations that the Austrian Gallery still possessed looted art, the Austrian Minister for Education and Culture for the first time opened up the Ministry's archives to permit research into the provenance of the national collection. The Austrian government also created a Committee made up of government officials and art historians to advise the Minister for Education and Culture on which artworks should be returned and to whom. The documents that surfaced in 1998 demonstrated that reliance on Adele's will as the source of legal title to the paintings was questionable at best.

Notwithstanding the discovery of the documents undermining the Austrian Gallery's ownership of the paintings, the Committee recommended against returning the six Klimt paintings at issue. Altmann alleges that the Committee vote was predetermined by the Austrian government before the Committee ever discussed the matter. Altmann points to the resignation of one Committee member who abstained from the vote and later stated that she had been ordered by a superior to vote against return of the six paintings.

In September 1999, Altmann decided to file a lawsuit in Austria to overturn the Committee's recommendation regarding the Klimt paintings. To do so, under Austrian law, Altmann was required to pay a filing fee that is a percentage of the recoverable amount. The standard formula used to calculate the court fees is 1.2% of the amount in controversy plus 13,180 Austrian schillings. Because the amount in controversy here is approximately $135 million, Altmann would have been required to pay about $1.6

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million to pursue her claim.[2] Altmann applied for legal aid, seeking reduction of the fees, and was granted a partial waiver. Based on the information detailing her assets, the court determined that Altmann and her co-heirs could afford a fee of 2 million schillings, or approximately $135,000. Although Altmann did not appeal the decision, the Republic of Austria appealed on the grounds that Altmann had not declared the value of various art objects worth almost $700,000 that she had recently recovered from the Austrian government. The petition was rejected as untimely. Regardless of the amount paid, in the event that Altmann prevailed in the Austrian civil action, she would be entitled to recover all of the court fees and her attorney's fees as part of the final judgment.

Because of what they viewed as the prohibitive cost of the lawsuit, Altmann and her family abandoned their Austrian complaint. On August 22, 2000, Altmann filed the present action against the Republic of Austria and the Gallery in the Central District of California. The Republic of Austria and the Gallery moved for dismissal under (i) Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction; (ii) Fed.R.Civ.P. 12(b)(3) for lack of venue; (iii) Fed.R.Civ.P. 12(b)(7) for failure to join indispensable parties; and (iv) the doctrine of *forum non conveniens*. The district court denied this motion on May 4, 2001.

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2. The exchange rate used is from the Declaration of Walter Friedrich in Support of the Republic's Motion to Dismiss and equals 14.7 Austrian schillings per U.S. dollar.

II. Subject Matter Jurisdiction— The Foreign Sovereign Immunities Act

On an appeal from the denial of a motion to dismiss, we review the dismissal de novo, accepting all well-pleaded factual allegations in the complaint as true and making all reasonable inferences in the non-movant's favor. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

A foreign state is normally immune from the jurisdiction of federal and state courts in the United States. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). The United States Supreme Court has long recognized that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Id.* The FSIA provides a limited means to obtain jurisdiction over foreign sovereigns and their agencies and instrumentalities and codifies a statutory set of exceptions to foreign sovereign immunity. Those exceptions include actions involving waiver of immunity, commercial activity, rights in property taken in violation of international law, rights in property in the United States, tortious acts occurring in the United States, and actions brought to enforce arbitration agreements with a foreign state. 28 U.S.C. § 1605. Thus a federal court cannot hear claims against sovereign nations, unless the claim falls within one of these enumerated exceptions. *Verlinden*, 461 U.S. at 497, 103 S.Ct. 1962.

Altmann contends that the taking of her family's Klimt paintings by the Austrian government violates international law and falls squarely within the expropriation exception to the FSIA. The district court agreed, finding that (i) the FSIA was retroactive

to the pre- and post-war acts of the Nazis and the Austrian government; (ii) personal jurisdiction existed over the Republic and the Gallery; (iii) the doctrine of *forum non conveniens* did not require transfer of jurisdiction to Austria; (iv) all necessary parties had been joined; and (v) venue was appropriate in the Central District of California. *Altmann v. Republic of Austria*, 142 F.Supp.2d 1187 (C.D. Cal. 2001). We turn first to whether the FSIA applies to Altmann's claims.

A. The Applicability of the FSIA

We must first determine whether the district court properly held that the FSIA may be applied to the alleged wrongful appropriation by the Republic. The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The defendants maintain that jurisdiction is lacking because the FSIA may not be retrospectively applied to conduct pre-dating the Department of State's 1952 issuance of the Tate Letter, while the last taking in this case purportedly occurred in 1948. *See* Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman, May 19, 1952 ("1952 Tate Letter"), *reprinted in* 26 Dep't State Bull. 984 (1952) *and in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 app. 2, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). To the extent courts have considered the retroactivity of the FSIA, the consensus appears to be that it would encompass events dating back at least as far as the date of this letter. *See Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988); *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986); *Slade v. United States of Mexico*, 617 F.Supp. 351 (D.D.C. 1985).

We need not reach the broad conclusion of the district court that the FSIA may be generally applied to events predating the 1952 Tate Letter. Instead, we find persuasive the reasoning set forth by Judge Wald, who resigned in 1999 from the Court of Appeals for the District of Columbia Circuit to serve two years as a judge on the International Criminal Tribunal for the Former Yugoslavia. In her dissenting opinion in *Princz v. Federal Republic of Germany*, Judge Wald agreed with the majority that application of the FSIA to pre-1952 conduct is not impermissibly retroactive, but set forth a narrower rationale for that conclusion. *See* 26 F.3d 1166, 1178-79 (D.C. Cir. 1994) (Wald, J., dissenting on other grounds), *cert. denied*, 513 U.S. 1121, 115 S.Ct. 923, 130 L.Ed.2d 803 (1995).

The "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *INS v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring)). Although Congress is empowered to enact statutes with retrospective effect, a statute may not be applied retroactively "absent a clear indication from Congress that it intended such a result." *Id.* (noting that cases where the Supreme Court has found truly retroactive effect involved statutory language so clear that it could sustain only one interpretation).

A statute does not operate "retrospectively," and thus impermissibly, simply because it applies to conduct antedating the statute's enactment. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). We "must ask whether the new provision attaches new legal consequences

to events completed before its enactment." *Id.* at 269-70, 114 S.Ct. 1483. "[T]he judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *St. Cyr*, 533 U.S. at 321, 121 S.Ct. 2271 (internal quotation marks omitted). We must consider "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483. "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Id.* at 269, 114 S.Ct. 1483 (quoting *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)). On the other hand, statutes that confer or oust jurisdiction, or change procedural rules, may be applied in suits arising before their enactment without raising concerns about retroactivity. *Id.* at 274-75, 114 S.Ct. 1483. Because these rules "take[ ] away no substantive right but simply change[ ] the tribunal that is to hear the case," present law governs in such situations. *Id.* at 274, 114 S.Ct. 1483 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508, 36 S.Ct. 202, 60 L.Ed. 409 (1916)).

The *Princz* majority found that Congress's intention for the FSIA to be retroactively applied was manifest in the statute's statement of purpose that "claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." *Princz*, 26 F.3d at 1170 (quoting 28 U.S.C. § 1602). The majority interpreted Congress's use of the word "henceforth" to mean that "the FSIA is to be applied to all cases decided after

its enactment, i.e., regardless of when the plaintiff's cause of action accrued." *Id.* The court also pointed out that Congress's deletion of the language in 28 U.S.C. § 1332 providing for diversity jurisdiction over suits by a United States citizen against a foreign government would prevent prospective plaintiffs from suing over pre-enactment acts unless the FSIA's replacement section, 28 U.S.C. § 1330, were available. *Id.* at 1170. Further, the *Princz* majority suggested, as the district court found here, that application of the FSIA to the facts at issue effected merely a change of jurisdiction; thus, because the FSIA did not alter liability under the applicable substantive law, its application would not be impermissibly retroactive. *Id.* at 1170-71; *see also Altmann*, 142 F.Supp.2d at 1200.

Other courts have determined not to apply the FSIA to events predating its enactment. *See Carl Marks*, 841 F.2d 26; *Jackson*, 794 F.2d 1490; *Slade*, 617 F.Supp. 351. Nevertheless, in reaching this conclusion, these courts did not rely solely on the lack of a clear expression of congressional intent; otherwise, they would have concluded that the FSIA could not be applied to events predating its 1976 enactment. Instead, they recognized that the FSIA would properly apply to events occurring after the issuance of the 1952 Tate Letter. *See Carl Marks*, 841 F.2d at 27 ("We believe, as did the district court, that only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions." (alterations and quotation marks omitted)); *Jackson*, 794 F.2d at 1497-98 ("We agree that to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)."); *Slade*, 617 F.Supp. at 356 ("[T]he Court finds that the FSIA cannot be

applied retroactively to this case where all the operative events occurred before 1952."). Although the issuance of the 1952 Tate Letter has been recognized as the moment when "the American position changed and the 'restrictive theory of sovereign immunity' was adopted," for purposes of determining whether Austria could have settled expectations of immunity in a United States court, we note the observation of Judge Re, Chief Judge Emeritus of the Court of International Trade, that it was announced in 1948 that the State Department was reconsidering the policy. Edward D. Re, *Human Rights, Domestic Courts, and Effective Remedies*, 67 St. John's L.Rev. 581, 583-84 (1993).

Assuming, without deciding, that these cases are correct that congressional intent to allow application of the FSIA to pre-enactment facts is not manifest in the statutory language, we turn to the second prong of the *Landgraf* test and examine "whether applying the FSIA would 'impair rights a party possessed when he acted,' " *Princz*, 26 F.3d at 1178 (Wald, J., dissenting on other grounds) (quoting *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483), i.e., whether Austria would have been entitled to immunity for its alleged complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life.

In determining what rights Austria possessed when it acted, and what were its legitimate expectations, we look to the practice of American courts at that time, which was one of judicial deference "to the case-by-case foreign policy determinations of the executive branch." *Id.* at 1178-79 (citing *Verlinden*, 461 U.S. at 486, 103 S.Ct. 1962). We note that in *Verlinden*, the Supreme Court explained that "[u]ntil 1952, the State Department ordinarily requested immunity in all actions against *friendly* foreign

sovereigns." 461 U.S. at 486, 103 S.Ct. 1962 (emphasis added). [This explanation made no distinction between *in rem* and *in personam* actions.] In 1943, the Supreme Court pronounced that "it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court." *Ex Parte Peru*, 318 U.S. 578, 587, 63 S.Ct. 793, 87 L.Ed. 1014 (1943). Two years later, the Court exercised *in rem* jurisdiction over a Mexican vessel, noting the absence of a certification of immunity by the State Department or other evidence supporting immunity in conformance with the principles accepted by the State Department. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-35, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

Determining whether the FSIA may properly be applied thus turns on the question whether Austria could legitimately expect to receive immunity from the executive branch of the United States for its [alleged] complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings. Mindful that such seizures explicitly violated both Austria's and Germany's obligations under the Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, 1907 U.S.T. LEXIS 29 (entered into force Jan. 26, 1910),[3] and that Austria's Second Republic officially repudiated all Nazi transactions in 1946, we hold that Austria could not expect such immunity.

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3. A number of the treaty's accompanying regulations are directly on point. Article 46 forbids the confiscation of private property, Article 47 forbids pillage, and Article 56 specifically forbids "[a]ll seizure of . . . works of art." 1907 U.S.T. LEXIS 29, at *37, *40.

That Austria and the United States were no longer on opposite sides of World War II at the time the Federal Monument Agency [allegedly] attempted to extort valid title to the Klimt paintings does not mean that Austria could reasonably expect the granting of immunity for an act so closely associated with the atrocities of the War. Although the deprivation of private property, while discriminatory and indeed dehumanizing, pales in comparison with the horrors inflicted upon those who, unlike Ferdinand, were unable to escape the slavery, torture, and mass murder of the Nazi concentration camps, we are certain that the Austrians could not have had any expectation, much less a settled expectation, that the State Department would have recommended immunity as a matter of "grace and comity" for the wrongful appropriation of Jewish property.

Indeed, the State Department's position on that question is evident in an April 13, 1949 letter from Mr. Tate announcing the State Department's adoption of a policy to remove obstacles to recovery specifically for victims of Nazi expropriations. On April 27, 1949, the United States State Department issued a press release stating, in pertinent part:

> As a matter of general interest, the Department publishes herewith a copy of a letter of April 13, 1949 from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 in the United States District Court for the Southern District of New York.
>
> The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the

> countries or peoples subject to their controls; states that *it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property;* and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is *to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.*

Press *Release No. 296*, "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," *reprinted in Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam) (emphasis added). The press release was accompanied by a copy of the actual letter, which states in pertinent part:

> 1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls.
>
> * * *
>
> 3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 (S.D.N.Y.), *reprinted in Bernstein*, 210 F.2d at 376. [This letter strongly indicates that the State Department would not have recommended immunity as a matter of grace and comity for Austria's expropriation of the Klimt paintings. Indeed, in January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, warning that

> they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.
>
> Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons . . . resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntary effected.

Dep't St. Bull., Jan. 1943, at 21-22.] We conclude, as did Judge Wald, that the application of the FSIA infringes on no right held

at the time the acts at issue occurred, and thus the FSIA is not impermissibly applied to Austria in this case.

This result is particularly apt for at least three additional reasons. First, we note that by the 1920s, Austria itself had adopted the restrictive theory, which recognizes sovereign immunity "with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." 1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 711, 96 S.Ct. 1854; *see also* Joseph M. Sweeney, The International Law of Sovereign Immunity 30 (U.S. Dep't of State Policy Research Study, 1963) ("At the end of World War I, the courts of Austria abandoned the absolute concept [of sovereign immunity] and adopted the restrictive concept."). As the Tate Letter of May 19 describes:

> The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 713, 96 S.Ct. 1854. Thus Austria could have had no reasonable expectation of immunity in a foreign court. As Judge Wald notes, the 1945-46 Nuremberg trials signaled "that the international community, and particularly the United States . . . would not have supported a broad enough immunity to shroud the atrocities

committed during the Holocaust." *Princz*, 26 F.3d at 1179 (Wald, J., dissenting on other grounds). Because a United States court would apply the international law of takings, which presumably would be applied in any foreign court, the application of the FSIA to the facts of this case "merely address[es] *which* court shall have jurisdiction" and thus "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (emphasis in original) (citing *Landgraf*, 511 U.S. at 275, 114 S.Ct. 1483). Because such application would "affect only *where* a suit may be brought, not *whether* it may be brought at all," *id.* (emphasis in original), the application of the FSIA to the facts of this case is not impermissibly retroactive.

Second, the cases holding the FSIA inapplicable to pre-1952 events involve economic transactions entered into long before the facts of this case arose and, unlike here, prior to the defendant country's acceptance of the restrictive principle of sovereign immunity and to the widespread acceptance of the restrictive theory. The Soviet Union, which was sued in *Carl Marks* over its default with respect to debt instruments issued in 1916, *see* 841 F.2d at 26, was in 1952, together with the Soviet satellite countries and the United Kingdom, one of the few remaining jurisdictions that supported "continued full acceptance of the absolute theory of sovereign immunity." 1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 715, 96 S.Ct. 1854. The 1952 Tate Letter also noted that China, sued in *Jackson* over its default on bonds issued in 1911, *see* 794 F.2d at 1491, was among the jurisdictions not yet having clearly adopted the restrictive principle. 1952 Tate Letter,

reprinted in Alfred Dunhill, 425 U.S. at 712, 96 S.Ct. 1854. As for Mexico, sued in *Slade* over its default over a 1922 interest agreement, *see* 617 F.Supp. 351, it is well-known that Latin-American nations did not accept the restrictive approach to immunity well into the 1980s. *See* Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, J. Chinese L., Spring 1987, at 22, 27.

Third, the disputes in *Carl Marks*, *Jackson*, and *Slade* essentially involved contracts, an area in which courts have traditionally deferred to the "settled expectations" of the parties at the time of contracting in recognition of the parties' allocation of risk. Such deference is especially due in financial transactions involving foreign debt instruments, where unexpected judicial intrusion essentially would re-write the parties' original bargain. Such presumptions are inapplicable in the context of a claim like the international takings violation at issue here. Thus, even if Austria had indeed expected not to be sued in a foreign court at the time it acted, an expectation which we have explained would be patently unreasonable, such expectation would be due no deference.

For these reasons, we hold that application of the FSIA to the pre-1952 actions of the Republic of Austria is not impermissibly retroactive.

B. Expropriation Exception to Sovereign Immunity

The FSIA's expropriation exception to immunity provides that:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. . . .

28 U.S.C. § 1605(a). This exception to foreign sovereign immunity "is based upon the general presumption that states abide by international law and, hence, violations of international law are not 'sovereign' acts." *West*, 807 F.2d at 826; H.R.Rep. No. 94-1487, at 14, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613 ("[T]he central premise of the bill [is that] decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law."); *see also Trajano v. Marcos (In re Estate of Marcos Human Rights Litig.)*, 978 F.2d 493, 497-98 (9th Cir. 1992) ("Congress intended the FSIA to be consistent with international law. . . ."). For guidance regarding the norms against takings in violation of international law, we may look to court decisions, United States law, the work of jurists, and the usage of nations. *See Siderman de Blake*, 965 F.2d at 714-15; *West*, 807 F.2d at 831 n. 10. Nevertheless, we recognize that "[a]t the jurisdictional stage, we need not

decide whether the taking actually violated international law; as long as a 'claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction.' " *Siderman de Blake*, 965 F.2d at 711 (quoting *West*, 807 F.2d at 826).

The facts alleged by Altmann fall squarely within the expropriation exception to sovereign immunity. There is no question but that "rights in property" are in issue. The Austrian Republic and Gallery insist on Adele's will as the basis for their legal ownership of the Klimt paintings. Altmann, as a true heir and as a representative of other heirs, asserts the will has no such legal effect and the documents unearthed in 1998 revealed that fact to the current Austrian government and to the Austrian Gallery, which nevertheless have retained possession of the paintings without payment therefor.

The next question is whether the property in issue was taken in violation of international law. To constitute a valid taking under international law three predicates must exist. First, "[v]alid expropriations must always serve a public purpose." *West*, 807 F.2d at 831. Second, "aliens [must] not be discriminated against or singled out for regulation by the state." *Id.* at 832. Finally, "[a]n otherwise valid taking is illegal without the payment of just compensation." *Id.* (relying on reports from the Foreign Claims Settlement Commission, international law journals, the *Restatement (Second) of Foreign Relations Law of the United States*, and federal case law). To fall into this exception, the plaintiff cannot be a citizen of the defendant country at the time of the expropriation, because " '[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.' " *Siderman de Blake*, 965 F.2d at 711 (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990)).

The facts of record, which in this procedural posture we must take as true, show that the Klimt paintings have been wrongfully and discriminatorily appropriated in violation of international law. The Nazis did not even pretend to take the Klimt paintings for a public purpose; instead, Dr. Fuehrer sold them for personal gain or exchanged them to supplement his private collection. In addition, their taking appears discriminatory. Altmann is a Jewish refugee, now a United States citizen, who is a descendant of a Czech family whose property was looted by the Nazis because of their religious heritage. According to Altmann, despite convening a Committee to evaluate expropriation claims and return stolen artwork, the Austrian government intentionally intervened to thwart a fair and impartial vote on the restitution of the Klimt paintings. Further, the Austrian government has not yet returned the paintings to Altmann and her family or justly compensated them for the value of the paintings.[4] Without compensation, this taking cannot be valid. *See West*, 807 F.2d at 832.

Finally, the Austrian Gallery is engaged in commercial activity in the United States. Altmann has satisfied the FSIA's statutory nexus requirement by showing that the paintings are owned or operated by an agency or instrumentality of the foreign state, here the Austrian Gallery, which is "engaged in commercial activity in the United States." 28 U.S.C. § 1605(a)(3). The defendants

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4. Austria now claims the Altmann family itself later donated the paintings in exchange for export permits on other artwork returned to the family after World War II. Altmann argues this practice was illegal, as the Austrian government later found, and thus any purported "donation" was legally void. Because this dispute is a mixed factual and legal question, it cannot be resolved on appeal and is best left for the trial court.

do not contest that the Gallery is an "agency or instrumentality." The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* at § 1603(d).

Altmann argues that the Gallery engages in commercial activity in the United States by authoring, editing, and publishing in the United States both a book entitled *Klimt's Women*, as well as an English-language guidebook, containing photographs of the looted paintings.[5] She also contends that the advertisements in the United States of Gallery exhibitions, particularly those relating to the Klimt paintings, as well as operation of the Gallery itself, constitute commercial activity. The key commercial behavior of the Gallery here is not its operation of the museum exhibition in Austria, however, but its publication and marketing of that exhibition and the books in the United States. *Klimt's Women*, for example, is published in English in the United States by Yale University Press and capitalizes on the images of three of the paintings at issue. That book was published in conjunction with a large exhibition at the Gallery featuring the expropriated paintings. Furthermore, the Austrian Gallery asserts copyright ownership as "authors"; two employees of the Gallery edited

5. ***See*** Appendix A, cover page of the Austrian Gallery English language guidebook; Appendix B, excerpts from *Gustav Klimt in the Austrian Gallery Belvedere*, authored by Gerbert Frodl, the director of the Austrian Gallery; Appendix C, excerpts from *Klimt's Women*, edited by Tobias Natter, the curator of twentieth century art at the Austrian Gallery, and Gerbert Frodl; and Appendix D, cover page of *Austrian Information*, July/August 2000, published by the Austrian Press and Information Service.

the book; and the director of the Gallery is listed as responsible for its content. The museum guidebook is also published in English and features the painting *Adele Bloch-Bauer I* on its cover. The publication and sale of these materials and the marketing of the Klimt exhibition in the United States are commercial activities in and of themselves, but are also a means to attract American tourists to the Gallery. Given that the commercial activity is centered around the very paintings at issue in this action and far exceeds that which we found sufficient to justify applying § 1605(a)(3) in *Siderman de Blake*, 965 F.2d at 709, we must conclude that the Gallery is engaging in commercial activity sufficient to justify jurisdiction under the FSIA.

III. Due Process and Personal Jurisdiction

Austria maintains that even if an exception to sovereign immunity applies, Altmann's suit cannot be maintained unless the district court has personal jurisdiction over the Republic and the Gallery. Under the FSIA, however, personal jurisdiction over a foreign state exists where subject-matter jurisdiction exists and where proper service has been made. 28 U.S.C. § 1330(b). Because we hold that the paintings are subject to the expropriation exception of the FSIA, and there has been proper service of process under § 1608, as the Republic concedes, the court has personal jurisdiction over the Republic and the Gallery.

We also hold that, if the facts are as Altmann alleges, the assertion of personal jurisdiction over the Republic and the Gallery complies with the Due Process Clause of the Fifth Amendment. Assuming that a foreign state is a "person" for purposes of the Due Process Clause, *Republic of Argentina v. Weltover*, 504 U.S. 607, 619, 112 S.Ct. 2160, 119 L.Ed.2d

394 (1992), there must be sufficient "minimum contacts" between the foreign state and the forum "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice," *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (citation omitted). *See also Theo. H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969, 974 & n. 3 (9th Cir. 1999) ("[W]e need not decide whether [the government agency] is a 'person' for purposes of the Due Process Clause. We simply assume, without deciding, that both are."). "Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). "Where service is made under FSIA section 1608, the relevant area in delineating contacts is in the entire United States, not merely the forum state." *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1447 (9th Cir. 1991) (internal quotation marks and alterations omitted).

The Republic and the Gallery have sufficient minimum contacts with the United States such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. As previously noted, the Gallery edits and publishes several publications in the United States, two of which capitalize on the very paintings at issue here. The Gallery's publication and marketing of these books is designed to solicit tourism by United States citizens in Austria and to attract those visitors to the Gallery, in particular to view the Klimt works. Both the Republic and the Gallery profit from the sales of the books and the resulting United States tourism.

Furthermore, it is not only the Gallery's activities in the forum, but also actions taken by the Government on behalf of the Gallery that support personal jurisdiction. *See Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981). The Austrian Press and Information Service of the Austrian Embassy has published a tourism brochure advertising the Klimt exhibition at the Austrian Gallery and featuring the portrait of Adele Bloch-Bauer on its cover. This brochure is available at Austrian consulates throughout the United States, distributed to a large mailing list of individuals in the United States, and is widely available on the Internet. The advertisement and promotion of this exhibition directly benefit the Gallery.

The Republic itself does not contest that it has substantial, systematic, and continuous contacts with the United States through its operation of consulates, sponsorship of tourist relations and trade, and promotion of Austrian business interests. The Republic alone operates three consulates in the United States and twenty-six honorary consulates in the United States and its territories.[6] The Austrian Trade Commission and Austrian National Tourist Offices operate in both New York and Los Angeles. Austria also recently invested $400,000 in the renovation of the Rudolf Schindler house, a historic architectural landmark in Los Angeles. Thus Altmann has established "continuous and systematic contacts." *Helicopteros*, 466 U.S. at 414-16 & nn. 8-9, 104

6. ***See*** Austrian Press and Information Service, *Austrian Offices in the United States*, *at* <http: //www.austria.org/govoff.htm# congen>. In addition to the Consulates General in New York City, Los Angeles, and Chicago, honorary consulates exist in Anchorage, Atlanta, Boston, Buffalo, Charlotte, Columbus, Denver, Detroit, Honolulu, Houston, Kansas City, Miami, Milwaukee, Nassau, New Orleans, Philadelphia, Pittsburgh, Portland, Richmond, St. Louis, St. Paul, St. Thomas, San Francisco, San Juan, Seattle, and Warwick.

S.Ct. 1868; *Siderman de Blake*, 965 F.2d at 709-10 (finding jurisdiction where hotel solicited United States tourism and accepted United States credit cards for payment for guest reservations). We do not hold that these contacts are enough to support general jurisdiction, but they support the reasonableness of the assertion of specific jurisdiction based on the Gallery's publication of books and advertisements featuring the Klimt works. We conclude that fair play and substantial justice would not be offended if we maintain jurisdiction over Austria in this case.

IV. Joinder of Parties

We reject Austria's contention that Altmann's co-heirs are necessary parties to the litigation requiring dismissal of this action under *Rule 19* unless they are joined. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir.), *cert. denied*, __ U.S. __, 123 S.Ct. 98, 154 L.Ed.2d 27 (2002). In determining whether the co-heirs are necessary parties under Rule 19, we consider whether, in the absence of their joinder, complete relief can be accorded to Altmann. *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). In the alternative, we consider whether the co-heirs can claim a legally protected interest in the subject of the suit such that a decision in their absence will (1) impair or impede their ability to protect that interest; or (2) expose the Republic of Austria and Altmann to the risk of multiple or inconsistent obligations by reason of that interest. *See* Fed.R.Civ.P. 19(a)(2); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999). Joinder is "contingent . . . upon an initial requirement that the absent party *claim* a legally protected interest relating to the subject matter of the action." *Northrop Corp. v. McDonnell*

Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983) (emphasis added). Where a party is aware of an action and chooses not to claim an interest, the district court does not err by holding that joinder was "unnecessary." *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999).

Although Altmann is an heir to only twenty-five percent of her uncle's estate, her relatives have assigned to her an additional fifty percent of their interest in the estate for purposes of this suit. Another relative, Altmann's cousin, who holds the remaining twenty-five percent interest in the estate does not live in the United States and is aware of the litigation. Given that all necessary parties are aware of the litigation and have chosen not to claim an interest, joinder of these parties is unnecessary to this suit. *See id.* (holding that the district court did not err by finding that a party who was aware of an action but chose not to claim an interest was not a necessary party under Rule 19).

V. Venue

The Republic and the Gallery also appeal the district court's denial of their motion to dismiss for improper venue. Relying on 28 U.S.C. § 1391(f)(3), the district court found that venue was appropriate in the Central District of California because it is a "judicial district in which the agency or instrumentality is licensed to do business or is doing business." The district court found "no authority that suggests that a foreign agency or instrumentality that engages in 'commercial activity' within a district is not also 'doing business' within a district." *Altmann*, 142 F.Supp.2d at 1215.

We agree with the district court that venue is appropriate in the Central District. Section 1391(f)(3) authorizes venue in any judicial district in which an agency or instrumentality of a foreign state is "doing business" if the agency or instrumentality is sued, and § 1391(f)(4) authorizes venue in the federal district court for the District of Columbia if the foreign state itself is sued. We do not read the statute to require that (f)(3) be the exclusive basis on which venue is available when an agency or instrumentality of the foreign state is sued, or that (f)(4) be the exclusive basis when a foreign state is sued. Sections (f)(3) and (f)(4) are alternative venue provisions, separated by the word "or." Where, as here, both the foreign state and its instrumentality are sued in the same suit, both venue provisions are potentially available. Because the publications and advertisements of the Austrian Gallery that form the basis for jurisdiction under the FSIA have been distributed in the Central District of California, we hold that the Austrian Gallery, an agency or instrumentality of Austria, is "doing business" in the district and that venue is therefore proper in the Central District under § 1391(f)(3). (We also note that an Austrian Consulate is located on Wilshire Boulevard in Los Angeles, a short distance from the federal courthouse; that diplomatic representatives of Austria work in the Central District; and that Altmann, now 86 years old, would be forced to travel to Washington, D.C. to pursue this action, significantly outweighing any inconvenience potentially experienced by the Republic of Austria.)

VI. Forum Non Conveniens

Finally, we hold that the district court did not err in denying Austria's motion to dismiss the action based on the doctrine of *forum non conveniens*. A district court may decline to exercise

its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). Because this determination is committed to the sound discretion of the district court, Austria faces an uphill battle in persuading us that the district court abused its discretion by denying Austria's motion. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1409 (9th Cir. 1983); *see also Leetsch v. Freedman*, 260 F.3d 1100, 1102-03 (9th Cir. 2001) (Where the court has considered the availability of an adequate alternative forum, and where it has considered and reasonably balanced all relevant public and private interest factors, its decision deserves substantial deference.).

Altmann contends that Austria cannot meet its threshold burden of providing an adequate alternative forum. The district court agreed, finding that because the Austrian filing fees are so oppressively burdensome and Altmann's claims will likely be barred by the thirty-year statute of limitations under Austrian law, these factors render the Austrian courts unavailable.

We disagree that the cost of the lawsuit in Austria, alone, makes this forum unavailable. The mere existence of filing fees, which are required in many civil law countries, does not render a forum inadequate as a matter of law. *See, e.g., Nai-Chao v. Boeing Co.*, 555 F.Supp. 9, 16 (N.D. Cal. 1982) (holding that despite filing fees amounting to one percent of claim and an additional one-half percent for each appeal, Taiwan was an adequate forum), *aff'd sub nom, Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983); *see also Mercier v. Sheraton*

Int'l, Inc., 981 F.2d 1345, 1353 (1st Cir. 1992), *cert. denied*, 508 U.S. 912, 113 S.Ct. 2346, 124 L.Ed.2d 255 (1993) (fifteen percent Turkish bond would not prohibit court from finding Turkey adequate forum); *Murray v. BBC*, 81 F.3d 287, 292-93 (2d Cir. 1996) (England was an adequate forum despite the plaintiff's claim that the American contingency fee system was the only way he could afford a lawyer). Altmann and her co-plaintiffs received significant legal aid based on her petition to the court for a reduction of fees. She did not appeal to further reduce these fees; nor did she apply for an extension of the term of payment of the court fees. Finally, it appears that the fee application was made without calculating the present value of Altmann's home or taking into account the value of a number of porcelain pieces returned by the Austrian government. Arguably, Altmann has greater assets available to her than she listed in her application to the court. Thus the Austrian filing fees are not a basis for finding an inadequate forum.

Nor are we convinced that Austria's statute of limitations bars Altmann's action in that forum. Although Altmann is correct that a thirty-year statute of limitations generally applies to civil claims in Austria, under Austrian law, acts of fraudulent concealment toll the statute. Moreover, the statute of limitations does not prevent Altmann from basing her claims on the 1998 Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections. This legislation "authorizes the Minister of Finance to return artworks in special instances enumerated in the States where claims could otherwise not be made," including the expiration of a statute of limitations.

Nevertheless, our conclusions with respect to the filing fees and the statute of limitations do not compel us to dismiss the

complaint on the grounds of *forum non conveniens*. Altmann's choice of forum should not be disturbed unless, when weighing the convenience of the parties and the interests of justice, "the balance is strongly in favor of the defendant." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). To make this determination, we consider both the "private interest" factors affecting the convenience of the litigants, including all "practical problems that make trial of a case easy, expeditious and inexpensive" as well as the "public interest" factors affecting the convenience of the forum, which include the administrative difficulties flowing from court congestion; the local interest in having localized controversies resolved at home; the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-09, 67 S.Ct. 839.

Austria claims that the private and public interest factors weigh in favor of conducting a trial in Austria. It argues that the evidentiary sources, the witnesses, and the paintings are all located in Austria and a United States district court would be required to apply Austrian law. We do not agree that these factors outweigh Altmann's choice of forum. Maria Altmann is an elderly United States citizen, who has resided in this country for over sixty years. The requisite foreign travel, coupled with the significant costs of litigating this case in Austria, weigh heavily in favor of retaining jurisdiction in the United States. Because of the discrete issues presented, this case alone is unlikely to cause much congestion in the courts. Finally, Austria has not set forth any potential conflicts of law beyond the statute of limitations, which it concedes is tolled for fraudulent concealment, as in the

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United States. Because the Republic of Austria has not made a "clear showing of facts which either (1) establish such oppression and vexation of a defendant as to be out of proportion to the plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems," *Cheng*, 708 F.2d at 1410 (internal quotation marks omitted), we uphold the findings of the district court as to *forum non conveniens*.

VII. Conclusion

Maria Altmann has alleged sufficient facts which, if proven, would demonstrate that the Klimt paintings were taken in violation of international law. At least as to the Republic of Austria and the national Austrian Gallery, applying the FSIA to the takings of these paintings in the 1930s and 1940s is not an impermissible retroactive application of the Act. Because the remainder of the Act's and other jurisdictional prerequisites are met, the district court properly exercised jurisdiction over Altmann's claims.

AFFIRMED and REMANDED for further proceedings.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED MAY 4, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 00-8913 FMC (AIJx)

MARIA V. ALTMANN,

Plaintiff,

vs.

REPUBLIC OF AUSTRIA, et al.

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS; ORDER GRANTING LEAVE TO AMEND COMPLAINT

Plaintiff is the niece and heir of Adele Bloch-Bauer who was a model for, and whose husband was the owner of, works of art painted by Gustav Klimt. Plaintiff brings this action to recover six Klimt paintings which were stolen by the Nazis and are presently in the possession of Defendants. By this Order, the Court concludes that it has jurisdiction over defendants by virtue of an immunity exception contained in the Foreign Sovereign Immunities Act.

Appendix D

This matter is before the Court on the Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, under Rule 12(b)(6) for failure to state a claim upon which relief may be granted,[1] under 12(b)(3) for lack of venue, under Rule 12(b)(7) for failure to join indispensable parties, and under the doctrine of *forum non conveniens*. For the reasons stated herein, the Defendants' Motion is **DENIED.**

I. Background

A. Factual Allegations of Complaint

1. The Nature of the Dispute

The present dispute centers on ownership rights to six paintings by the world-renowned artist, Gustav Klimt. Specifically, at issue in the current action are six paintings with the following titles: *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Beechwood*, *Apple Tree I*, *Houses in Unterach am Attersee*, and *Amalie Zuckerkandl* (collectively, "the paintings").[2] The paintings are currently in the possession of

1. Defendants' Rule 12(b)(6) motion was based on the act of state doctrine. Defendants have since withdrawn this motion.

2. The paintings at issue are valued at approximately $150 million. It appears that these paintings are significant works of art in the Gallery's collection. All the paintings, with the exception of *Amalie Zuckerkandl*, have been displayed in the Gallery within the last two years. *Adele Bloch-Bauer I* appears on the cover of the Gallery's guidebook, and *Adele Bloch-Bauer I*, *Adele Bloch-*

(Cont'd)

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the Republic of Austria ("the Republic") and/or the Austrian Gallery ("the Gallery").[3] Plaintiff seeks recovery of these paintings that were owned by her family before they were stolen by the Nazis in the early 1940s in Austria.[4]

2. Events in Pre-World War II Austria

The paintings at issue were owned by Ferdinand Bloch-Bauer, Plaintiff's uncle. Plaintiff's aunt, Ferdinand's wife, Adele Bloch-Bauer, died in 1925. When Adele died, she left a will asking that her husband consider donating six paintings

(Cont'd)

Bauer II, and *Amalie Zuckerkandl* appear in a book entitled *Klimt's Women* that is edited by Gallery employees and distributed in the United States by Yale University Press. These three paintings were also featured in an exposition entitled "*Gustav Klimt: Portraits of European Women*" that was held from September 20, 2000, to January 7, 2001, in Vienna.

3. Collectively, the Republic and the Gallery are referred to as "Defendants" or "Austria".

4. Plaintiff is Jewish. She and her family suffered persecution under the Nazi regime in Austria and ultimately fled the country.

Prior to 1938, Austria was an independent democratic republic. In 1938, the Nazis invaded Austria ("the Anschluss") and claimed Austria as a part of Germany. Almost immediately after the invasion, the Nazis enacted anti-Jewish laws and regulations that severely restricted the property rights of those of Jewish descent. Businesses and property belonging to Jews was "aryanized," i.e., given to non-Jewish individuals whose loyalty belonged to the Nazi party.

to the Austrian Gallery on his death.[5] When the will was probated, the paintings were found to be part of Ferdinand's property, not Adele's. Ferdinand stated in 1926 that he intended to donate the paintings in accordance with his wife's wishes, but did not ever do so. Ferdinand donated one painting to the Gallery in 1936, a painting by Gustav Klimt entitled *Schloss Kammer am Attersee III.*

3. Plaintiff's Escape to the United States

Plaintiff was married shortly before the Nazi's annexation of Austria in 1938. Plaintiff and her husband escaped Austria to the Netherlands, to Britain, and finally to the United States. In 1942, Plaintiff arrived in Los Angeles, where she has lived since that time. Plaintiff became a naturalized citizen in 1945.

4. Ferdinand and His Artwork — The Nazi Occupation of Austria

Ferdinand left Austria in 1938; the Nazis took his home, his business, and his artwork. Four hundred pieces of porcelain were sold at public auction. Several Nineteenth century Austrian paintings went to Adolph Hitler's and

5. The six paintings addressed in Adele's will are *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Beechwood*, *Apple Tree I*, *Houses in Unterach am Attersee*, and *Schloss Kammer am Attersee III.* The portrait of Amalie Zuckerkandl, which is also at issue in this action, was not among those mentioned in Adele's will. Conversely, *Schloss Kammer am Attersee III*, which was mentioned in Adele's will, is not at issue in this action because Ferdinand donated it to the Gallery in 1936.

Herman Göring's private collections. Dr. Erich Führer, a Nazi lawyer in charge of liquidating Ferdinand's collection, also benefitted.

The paintings at issue in the present suit were transferred in various ways:

Adele Bloch-Bauer I and *Apple Tree I* were traded in 1941 to the Austrian Gallery for *Schloss Kammer am Attersee III.*[6] *Adele Bloch-Bauer I* appears on the cover of the Gallery's official guidebook of the museum.

Beechwood was sold in November 1942 to the Museum of the City of Vienna. In 1947, the Museum offered to return the painting to Plaintiff and Ferdinand's other heirs (collectively, "the heirs") in exchange for refund of the purchase price. The painting was, in the late 1940s, transferred to the Gallery with the assistance of the heirs' lawyer.

Adele Bloch-Bauer II was sold in March 1943 to the Austrian Gallery.

Houses in Unterach am Attersee was kept by Dr. Führer for his personal collection. This painting was later retrieved from that collection by Plaintiff's brother. It was in possession of the heirs' Austrian lawyer in late 1940s and was returned to the Gallery in exchange for export licenses for other works of art.

6. *Schloss Kammer am Attersee III* was later sold to Gustav Klimt's son. In 1961, this painting was donated to the Gallery.

The original disposition of *Amalie Zuckerkandl*[7] is not known; the painting eventually turned up in the hands of art dealer Vita Künstler, who donated it to the Gallery in 1988.

5. After the War

Ferdinand died just a few months after the war in Europe ended, but he took preliminary steps to retrieve his stolen property. Ferdinand made no bequest in his will to the Austrian Gallery.

In 1946, the Republic enacted a law declaring that all transactions that were motivated by discriminatory Nazi ideology were to be deemed null and void; however, the Republic often required the original owners of such property, including works of art, to repay to the purchaser the purchase price before an item would be returned.

Austrian law also prohibited the export of artworks that were deemed to be important to Austria's cultural heritage. It was the policy after the war to use the export license law to force Jews who sought export of artworks to trade artworks for export permits on other works.

6. Ferdinand's Heirs' Attempts to Secure the Paintings After the War

In 1947, a Swiss court recognized Plaintiff as the heir to 25% of Ferdinand's estate. The heirs retained an Austrian

7. Another Austrian family has asserted ownership rights to this painting as well.

lawyer to attempt to secure return of Ferdinand's property. Plaintiff's older brother was a captain in the Allied Forces, and he personally recovered *Houses in Unterach am Attersee* from Dr. Führer's private collection. The painting was kept in his or his lawyer's apartment in Vienna pending permission to export the painting.

In February 1948, the Austrian lawyer sought return of *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, and *Apple Tree I* from the Gallery. The Gallery asserted that five of the six paintings at issue were bequeathed to it by the will of Adele Bloch-Bauer in 1926, and that Ferdinand was merely granted permission to keep the paintings during his lifetime. The Gallery demanded the heirs return the remaining paintings to it.

7. The Museum's Actions In Protecting Its Collection

In March 1948, Dr. Garzarolli of the Austrian Gallery learned of the contents and probate proceedings of Adele's will. Specifically, Garzarolli learned that Adele had expressed the wish that Ferdinand donate the paintings to the Gallery, but that Adele had not herself bequeathed the paintings to the Gallery. Garzarolli acknowledged as much in a March 8, 1948, letter to his predecessor wherein Garzarolli expressed his concern at his predecessor's failure to obtain a declaration of gift in favor of the state from Ferdinand.[8] Dr. Garzarolli

8. An excerpt of this letter is set forth in ¶ 42 of the Complaint:

> Because there is no mention of these facts [the purported donation of the Klimt paintings by Adele or Ferdinand]

(Cont'd)

did not reveal to the heirs or their lawyers the files from Adele's probate proceedings that he had in his possession; rather, he prepared to sue the heirs for the remaining paintings.

8. The Exchange—Donations for Export Licenses

In late March 1948, Gallery officials reviewed the artwork in the apartment belonging to Plaintiff's brother or his lawyer to determine whether an export license could be granted. The officials recognized the pieces as part of Ferdinand's collection. Dr. Garzarolli sought the assistance of the Austrian Attorney General in obtaining possession of the remaining three paintings.

(Cont'd)

> in the available files of the Austrian Gallery, i.e., neither a court-authorized nor a notarized or other personal declaration of Ferdinand Bloch-Bauer exists, which in my opinion you certainly should have obtained, I find myself in an extremely difficult situation. . . . I cannot understand why even during the Nazi era an incontestable declaration of gift in favor of the state was never obtained from Ferdinand Bloch-Bauer. . . .
>
> In any case, the situation is growing into a sea snake . . . I am very concerned that up until now all of the cases of restitution have brought with them immense confusion. In my opinion it would be also in your interest to stick by me while this is sorted out. Perhaps that way we will best come out of this not exactly danger-free situation.

In early April, Dr. Garzarolli wrote to Dr. Otto Demus, president of the Federal Monument Agency (the agency in charge of the export licenses), and suggested that the processing of export permits for Ferdinand's collection be delayed "for tactical reasons." Dr. Demus met with the heirs' lawyer regarding the artwork already in Austria and other items of artwork belonging to Ferdinand to be returned to Austria by the Allied forces. The lawyer understood from Dr. Demus that "donations" to the Gallery would have to occur in order to procure export licenses for any of Ferdinand's collection.

The lawyer, on behalf of the heirs,[9] agreed to "donate" the Klimt paintings in exchange for permits on the remaining items. The lawyer learned the contents of Adele's will, but thought Ferdinand's expressed intention to donate the Klimt paintings would be binding. The lawyer executed a document purporting to acknowledge the intention to donate the paintings expressed in Adele's will. The lawyer gave the Gallery *Houses in Unterach am Attersee* on April 12, 1948.

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9. Plaintiff was unaware of the attorney's actions until 1999. She did not authorize the attorney to negotiate on her behalf, nor did she authorize "donating" the paintings to the Gallery. Until 1999, Plaintiff believed that her family had donated the paintings to the Gallery. The Gallery's misrepresentations to the attorney were relayed to her brother, who later relayed them to her.

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9. 1998 Discovery by Austrian Journalist

In 1998, after the seizure of two paintings by Egon Schiele in New York,[10] the Austrian federal minister opened up the Gallery's archives to permit researchers to prove that no looted artworks remained in Austria. Thereafter, an Austrian journalist, Hubertus Czernin, published a series of articles exposing the fact that Austria's federal museums had profited greatly from exiled Jewish families after the war.[11]

10. The painting *Portrait of Wally* by Egon Schiele was taken from its owner in Nazi-occupied Austria. *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000). At the end of World War II, the painting was recovered by Allied Forces and was returned to Austria to be returned to its rightful owner. *Id.* The painting was not ever returned to its owner. *Id.* In 2000, the painting, while on loan to the Museum of Modern Art in New York City, was seized pursuant to a seizure order issued by a United States magistrate judge pending proceedings under the National Stolen Property Act ("NSPA"), 18 U.S.C. § 2314, which prohibits transporting stolen goods in foreign commerce. *Id.* The court held that the painting could not be considered "stolen" under the NSPA once it was recovered by Allied Forces because the Allied Forces would be considered the owner's "agent" for purposes of the NSPA.

11. In January 1999, the Austrian government permitted Czernin to copy documents from the Gallery archives. Czernin provided copies of these documents to Plaintiff's lawyer, and Plaintiff learned how the Klimt paintings came to be in the possession of the Austrian Gallery.

California law recognizes that owners of stolen works of art are often unable immediately to file a cause of action for its recovery. *See Society of California Pioneers v. Baker*, 43 Cal. App. 4th 774, 50 Cal. Rptr. 2d 865 (1996); Cal.Code Civ. P. § 338 (establishing a three year statute of limitations that accrues upon the discovery of the whereabouts of a stolen article of artistic significance).

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Adele Bloch-Bauer I, reported by the Gallery as being donated to the Gallery in 1936, was revealed to have been transferred to the museum in 1941 with a letter from Dr. Führer signed "Heil Hitler." The archives were closed, but government research essentially confirmed Czernin's stories.

10. New Law Favoring Return of Artwork Stolen by Nazis

In response, in September 1998, a new restitution law was proposed in Austria, designed to return artworks that had been donated to federal museums under duress in exchange for export permits. The law was enacted in December.

A committee of government officials and art historians was formed by the new law, and in February 1999, the committee recommended that hundreds of artworks be returned to their rightful owners. In response to inquiries from the Austrian parliament, Minister Gehrer, Austria's federal minister of education and culture, concluded that there was an evident connection between the donation of the Klimt paintings and the export permit law.

There was political opposition to the return of the Klimt paintings. The committee received an incomplete report regarding the Klimts, and some members did not receive an expert's opinion regarding the invalidity of the purported bequest to the Gallery. On June 28, 1999, the committee met and affirmed a recommendation that the Klimts not be returned. The vote on the return of the paintings was predetermined, and one member of the committee eventually

resigned in protest. The committee did vote to return 16 Klimt drawings and 19 porcelain settings previously donated by the family in exchange for export permits.

Plaintiff protested the committee's decision and requested arbitration. The Republic rejected this approach, suggesting that the heirs' only remedy was to go to court.

11. Attempt at Austrian Judicial Intervention

In September 1999, Plaintiff announced she would file a lawsuit regarding the paintings. However, the court costs associated with bringing such a suit in Austria are determined by the amount in controversy. Plaintiff would have to pay a filing fee of approximately two million Austrian Schillings[12] for the privilege of suing the Republic and the Gallery even after obtaining a partial waiver of court costs. The Austrian Court noted the amount of Plaintiff's assets and suggested that Plaintiff should spend all of her liquid assets in furtherance of her claim because the alternative would be to charge the court costs to the Austrian public.

12. The current exchange rate of Austrian Schillings to United States Dollars is approximately 15:1. In today's terms the filing fee would be approximately $133,000. In October 1999, when Plaintiff filed her request for assistance, the Austrian Schilling was stronger against the United States dollar, so the filing fee was slightly higher. According to Plaintiff, the exchange rate in October 1999 was 10:1, and the filing fee would have been $200,000. Nevertheless, regardless of the exchange rate used, the filing fee is quite substantial.

B. Factual Allegations Regarding Jurisdiction[13]

The Gallery publishes a museum guidebook in English available for purchase by United States citizens. The Gallery has lent *Adele Bloch-Bauer I* to the United States in the past.

The Gallery is visited by thousands of United States citizens each year. The Gallery's collection, including the paintings at issue in this action, is advertised in the United States.

The Republic has a consular office in Los Angeles. The Republic promotes Austrian filmmakers in the United States. The Republic owns real property in Los Angeles.

C. Plaintiff's Claims

Plaintiff seeks recovery under a variety of causes of action. Her first cause of action is for declaratory relief pursuant to 28 U.S.C. § 2201; Plaintiff seeks a declaration that the Klimt paintings should be returned pursuant to the 1998 Austrian law. Plaintiff's second cause of action is for replevin, presumably under California law; Plaintiff seeks return of the paintings. Plaintiff's third cause of action seeks

13. Plaintiff also makes allegations regarding the activities of the National Tourist Office in United States. These allegations may not be used to assert jurisdiction over the Republic or the Gallery. *See* 28 U.S.C. § 1605(a)(3) (applying expropriation exception to FSIA when expropriated property is owned or operated by an agency or instrumentality of the foreign state when ***that*** agency or instrumentality is engaged in commercial activity in the United States).

rescission of any agreements by the Austrian lawyer with the Gallery or the Federal Monument Agency due to mistake, duress, and/or lack of authorization. Plaintiff's fourth cause of action seeks damages for expropriation and conversion, and her fifth cause of action seeks damages for violation of international law. Plaintiff's sixth cause of action seeks imposition of a constructive trust, and her seventh cause of action seeks restitution based on unjust enrichment. Finally, Plaintiff's eighth cause of action seeks disgorgement of profits under the California Unfair Business Practices law.

D. The Present Motion

Defendants argue that they are immune from suit under the doctrine of sovereign immunity, and that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1601, *et seq.*, does not strip them of this immunity. Defendants also argue that the Court should decline to exercise jurisdiction over the present dispute under the doctrine of *forum non conveniens*, that the action should be dismissed for Plaintiff's failure to join indispensable parties under Fed. R. Civ. P. 19, and that venue in the Central District of California is improper.

Plaintiff argues that Defendants are subject to the Foreign Sovereign Immunities Act, but that the expropriation exception to sovereign immunity is applicable to Defendants. Plaintiff also argues that even if Defendants are not subject to the FSIA, they are required to return the paintings under international and Austrian law. Plaintiff argues that the Court should not apply the doctrine of *forum non conveniens* because no reasonable alternative forum is available. Plaintiff

also argues that dismissal is not required under Fed. R. Civ. P. 19 because Plaintiff has received assignments of rights from other parties with interest in the paintings and because, in the absence of an alternative forum, it would be unjust to dismiss the present action. Finally, Plaintiff argues that venue is appropriate in the Central District because Defendants have failed to deliver the paintings to her within the district and because Defendants do business within the district.

II. Subject Matter Jurisdiction — The Applicability of the Foreign Sovereign Immunities Act

A. Rule 12(b)(1) Standard

A motion to dismiss an action for lack of subject matter jurisdiction is properly brought under Fed. R. Civ. P. 12(b)(1). The objection presented by this motion is that the Court has no authority to hear and decide the case. When considering a Rule 12(b)(1) motion challenging the substance of jurisdictional allegations, the Court is not restricted to the face of the pleadings, but may review any evidence, such as declarations and testimony, to resolve any factual disputes concerning the existence of jurisdiction. See *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

B. Foreign Sovereign Immunities Act — General Rule

The FSIA is the sole basis for jurisdiction over a foreign state and its agencies and instrumentalities. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683 (1989). Under the FSIA, foreign states are presumed to be immune from the jurisdiction of the

United States courts unless one of the FSIA's exceptions applies. 28 U.S.C. § 1604.

C. Burden of Proof Under FSIA

If a plaintiff's allegations and uncontroverted evidence establish that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017, 113 S. Ct. 1812 (1993).

D. Applicability of FSIA to pre-1952 Events

1. The Tate Letter

Until 1952, foreign states and their agencies and instrumentalities were absolutely immune from suit in United States courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962 (1983); *Siderman de Blake*, 965 F.2d at 705. In 1952, the Acting Legal Adviser of the State Department, Jack Tate, sent a letter ("the Tate Letter") to the Acting Attorney General announcing that the State Department was adopting the restrictive principle of foreign sovereign immunity. *Verlinden*, 461 U.S. at 487, n.9. Under the restrictive principle of sovereign immunity, the immunity of a foreign sovereign is recognized with regard to a sovereign's public acts (*jure imperii)*, but is not recognized with respect to a sovereign's private acts (*jure gestionis*). *Siderman de Blake*, 965 F.2d at 705 (citations omitted).

The Tate Letter, while announcing this new policy, did not provide courts with concrete standards for determining whether to assert jurisdiction over suits against foreign states. *Id.* In 1976, with the passage of the FSIA, Congress provided such standards. *Id.* The FSIA codified the restrictive theory of sovereign immunity and conferred subject matter jurisdiction over claims against foreign sovereigns on the United States courts. *Id.*; H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6613.

2. Defendant's Position — FSIA Does Not Apply to Pre-1952 Events

Defendants argue that because the FSIA was meant to codify the restrictive principle of sovereign immunity, and because this policy was not adopted until 1952, the FSIA is not applicable to actions that occurred prior to 1952. Defendants contend, therefore, that they are entitled to absolute sovereign immunity in accordance with the State Department's policy prior to the issuance of the Tate Letter. Defendants' position is not without support.

The Eleventh Circuit first considered this issue in 1986. *See Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917, 107 S. Ct. 371 (1987). At issue in *Jackson* were claims regarding bearer bonds issued by the Imperial Government of China in 1911 that were to mature in 1951. *Id.* at 1497. The Eleventh Circuit affirmed the district court's holding that the FSIA did not confer jurisdiction for actions prior to the issuance of the Tate Letter. *Id.* The Eleventh Circuit reasoned that courts normally presume that legislative enactments are to apply

prospectively, and that there was no reason to deviate from this presumption because the FSIA was not intended to affect the substantive law of liability. *Id.* The Eleventh Circuit agreed with the district court's reasoning that to apply the FSIA to pre-1952 events would interfere with China's established expectations of absolute immunity. *Id.* Therefore, the Eleventh Circuit concluded, the FSIA did not apply to pre-1952 events. *Id.* at 1499.

In 1985, the District Court for the District of Columbia relied on *Jackson* and held that the FSIA did not apply to a claim based on a 1922 agreement between the plaintiff and the United States of Mexico. *Slade v. United States of Mexico*, 617 F. Supp. 351, 356 (D.D.C. 1985). The district court in *Slade*, like the Eleventh Circuit in *Jackson*, reasoned that the presumption of prospective application of legislative enactments supported Mexico's position that the FSIA did not apply to pre-1952 events. *Id.* at 356. The *Slade* court also had the same concerns as the *Jackson* court regarding interfering with the foreign sovereign's established expectations of absolute immunity. *Id.* at 357. Later, in 1993, the District Court for the District of Columbia again held, relying on *Jackson* and *Slade*, that the FSIA was inapplicable to pre-1952 events. *Djordevich v. Bundeminister Der Finanzen, Federal Republic of Germany*, 827 F. Supp. 814 (D.D.C. 1993). This case was affirmed by the District of Columbia Circuit on other grounds.

In 1988, the Second Circuit relied on *Jackson* and *Slade* and held that the Union of Soviet Socialist Republics ("USSR") was absolutely immune from claims based on debt instruments issued by the Russian Imperial Government in

1916 because the claims arose prior to the issuance of the Tate Letter. *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1988), *cert. denied*, 487 U.S. 1219, 108 S. Ct. 2874 (1988). The Court noted that a retroactive application of the FSIA would adversely affect the USSR's settled expectation of immunity from suit in the United States courts. *Id.*

Although the Defendants' position on the FSIA's applicability to pre-1952 events is supported by case law, the continued viability of these cases is in doubt in light of the United States Supreme Court's subsequent decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994). *Landgraf*, as well as cases decided after *Landgraf* regarding the FSIA's application to pre-1952 events, lead the Court to conclude that the FSIA applies to pre-1952 events.

E. *Landgraf v. USI Film Products, Inc.*

In *Landgraf*, the United States Supreme Court held that in determining whether to apply a legislative enactment to events that occurred prior to the enactment, a court must first consider whether Congress expressly stated the statute's reach. *Landgraf*, 511 U.S. at 280. If Congress has made no expression of its intent, the court must then determine whether, if applied to events that preceded the enactment's effective date, the statute would have a "retroactive effect"; i.e., whether it would impair rights a party possessed when he acted, impose new duties on a party, or increase a party's liability for past conduct. *Id.* Statutes conferring jurisdiction generally do not have a retroactive effect. *Id.* at 274

("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed"). "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " *Id.* (citation omitted).

The *Landgraf* case noted the tension between two principles of statutory interpretation. The first principle is that normally a court is to apply the law in effect at the time it renders a decision. *Id.* at 264. The second principle is that cited by the *Jackson*, *Carl Marks*, and *Slade* cases: Retroactivity of legislative enactments is not favored in the law. *Landgraf*, 511 U.S. at 264. In its discussion of retroactive application of jurisdictional statutes, the Supreme Court noted that the first principle — application of present law — is the most relevant. "Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than the rights or obligations of the parties.' " *Id.* (citation omitted). Thus, the Supreme Court rejected the rationale that was employed by the *Jackson*, *Carl Marks*, and *Slade* courts in situations involving the question of retroactivity of jurisdictional statutes. In these situations, the Supreme Court favors applying the law in effect at the time of the decision.

The FSIA does not affect any substantive law determining the liability of a foreign state or instrumentality. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S. Ct. 2591 (1983). *See also* H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin. News at 6610 ("The bill is not intended to affect the

substantive law of liability.").[14] This favors applying the FSIA to pre-1952 events. *See Jeffries v. Wood*, 114 F.3d 1484

14. *But see Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S. Ct. 1962 (1983). The *Verlinden* Court rejected a constitutional challenge to the FSIA and held that a claim brought pursuant to the FSIA "arises under" federal law as that term is used in Article III of the United States Constitution. In arriving at this conclusion, the Court noted that the FSIA is more than a mere jurisdictional statute:

> As the House Report clearly indicates, the primary purpose of the act was to "set forth comprehensive rules governing sovereign immunity" . . . ; the jurisdictional provisions of the Act are simply one part of this comprehensive scheme. The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law, . . . and applying those standards will generally require interpretation of numerous points of federal law.

Id. at 496-97 (citations omitted). At first glance, the above-quoted passage from *Verlinden* seems at odds with *First Nat'l City Bank*'s pronouncement that the FSIA was not intended to affect the substantive law determining the liability of a foreign state. These cases, however, were decided in the same session of the United States Supreme Court, and were issued within one month of each other. *See Verlinden*, 461 U.S. at 480 (decided May 23, 1983); *First Nat'l City Bank*, 462 U.S. at 611 (decided June 17, 1983). Presumably, therefore, any inconsistencies between the two decisions would have been resolved prior to the issuance of *First Nat'l City Bank*. A closer reading of *Verlinden* leads the Court to the conclusion that there is no inconsistency between the two decisions.

(Cont'd)

(9th Cir.) (en banc) (noting that *Landgraf* identified statutes that confer or oust jurisdiction as an example of statutes that generally do not have a retroactive effect), *cert. denied*, 522 U.S. 1008, 118 S. Ct. 586 (1997). Other courts that have, after *Landgraf*, considered the applicability of the FSIA to pre-1952 events have suggested or concluded that the FSIA should apply to pre-1952 events. In 1994, the District of Columbia Circuit addressed the issue in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121, 115 S. Ct. 923 (1995). There, the court noted that there is a strong argument in favor of applying the FSIA to pre-1952 events. *Id.* at 1170. The FSIA provides

(Cont'd)

The *Verlinden* Court reasoned that the FSIA was within Congress' Article I power to regulate foreign commerce, and that the FSIA was within the Article III limitations on the power of the judiciary because claims against foreign sovereigns would necessarily arise under federal law.

> Congress, pursuant to its unquestioned Article I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. In so doing, Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into the federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states. ***The resulting jurisdictional grant is within the bounds of Article III, since every action against a foreign sovereign, necessarily involves application of a body of substantive federal law, and accordingly "arises under" federal law, within the meaning of Article III.***

Id. at 497 (emphasis added).

that "[c]laims of foreign states to immunity should ***henceforth be decided*** by courts of the United States . . . ***in conformity with the principles set forth in this chapter***." 28 U.S.C. § 1602 (emphasis added). This language, the *Princz* court stated, suggests that the FSIA is to be applied to all cases decided after its enactment regardless of when the plaintiff's cause of action may have accrued. *Princz*, 26 F.3d at 1170. The *Princz* court also noted that this result is supported by *Landgraf* because the FSIA is a jurisdictional statute that does not alter substantive legal rights.[15] *Id.* at 1171.

Later, in 1999, the District of Columbia Circuit held that a 1988 amendment to the FSIA could be applied to events preceding the amendment's enactment. *Creighton Limited v. Government of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999). The court reasoned that the amendment was jurisdictional in nature and that therefore, under *Landgraf*, could be applied under the principle of statutory interpretation requiring the court apply the law in effect at the time it renders a decision. *Id.* at 124.

15. Defendants correctly note that *Lin v. Government of Japan*, No. 92-2574, 1994 WL 193948 (D.D.C., May 6, 1994), held that the FSIA should not be applied to pre-1952 events. The *Lin* court explicitly noted that *Landgraf* did not require a contrary result. *Id.* at *12. However, *Lin* is not persuasive for two reasons. First, the decision itself is not a published decision and is therefore of little precedential value in light of the District of Columbia Circuit's Rule 28(c), which prohibits the citation of this case as precedent to the District of Columbia. Second, *Lin* was decided before *Princz* and *Creighton*, in which the District of Columbia Circuit noted that, under *Landgraf*, application of the FSIA to pre-1952 events is appropriate.

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A district court in the Northern District of Illinois relied on *Princz* and *Creighton* and held that the FSIA could be applied to pre-1952 events. *Haven v. Rzeczpospolita Polska (Republic of Poland)*, 68 F. Supp. 2d 943, 945 (N.D. Ill. 1999) (denying Poland's motion to dismiss claims based on allegations of expropriation of real property during and shortly after World War II). Although the *Haven* court noted that the determination of whether to apply the FSIA to pre-1952 events was a difficult question to resolve, the court noted that the post-*Landgraf* cases of *Princz* and *Creighton* were more persuasive than the pre-*Landgraf* cases of *Jackson* and *Carl Marks*. This Court agrees.

For these reasons, the Court holds that the FSIA applies to pre-1952 events.[16]

F. Expropriation Exception to Sovereign Immunity

1. An Exception of the FSIA Must Apply

Even though the FSIA applies to pre-1952 events, one of the exceptions to the FSIA's general rule of immunity must

16. Both parties seem to assume that only pre-1952 conduct is at issue in this action. Indeed, the conduct of Gallery officials in the late 1940s is relevant, but other conduct — well after 1952 — is at issue as well. Plaintiff's claims include allegations that Austria concealed the true ownership of the paintings from her and the other heirs even after 1952. The expropriation exception to foreign sovereign immunity concerns itself with property taken in violation of international law, rather than the taking of property in violation of international law. *See infra*, section III.F.2. These post-1952 acts also establish jurisdiction under the expropriation exception to foreign sovereign immunity.

Appendix D

apply, or Austria is entitled to sovereign immunity. Plaintiff claims that the "expropriation exception" to the FSIA applies. *See* 28 U.S.C. § 1605(a)(3). That exception provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. . . .

Id.

This exception has two distinct clauses, separated by a semi-colon. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6613. The first clause "involves cases where the property in question or any property exchanged for such property is present in the United States." *Id.* Because the Klimt paintings are not present in the United States, the first clause does not apply.

The second clause involves cases in which "the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in

commercial activity in the United States. Under the second [clause], the property need not be present [in the United States] in connection with a commercial activity of the agency or instrumentality." *Id.*

This exception has three distinct requirements. First, there must be property taken in violation of international law — i.e., the property must have been expropriated. Second, the property must be "owned or operated by an agency of or instrumentality of a foreign state. . . ." Finally, the agency or instrumentality must be engaged in commercial activity in the United States.

2. Property Must Be Taken In Violation of International Law

At the jurisdictional stage, a court need not determine if property was taken in violation of international law; so long as the plaintiff's claims are substantial and non-frivolous, there is a sufficient basis for the exercise of the court's jurisdiction. *Siderman de Blake*, 965 F.2d at 711. The foreign state against whom a claim is made need not be the sovereign that expropriated the property at issue. *See* 28 U.S.C. § 1605(a)(3) (excepting claims regarding property "taken in violation of international law" rather than excepting claims against foreign states that have taken property in violation of international law).

There are three requisites to a valid taking under international law. *Id.* First, the taking must serve a public purpose; second, aliens must not be discriminated against or singled out for regulation by the state; and third, payment of just compensation must be made. *Id.* at 711-12.

Here, Plaintiff's allegations establish a substantial and non-frivolous claim that a taking in violation of international law occurred on at least two occasions. First, the Nazi "aryanization" of Ferdinand's art collection by the Nazis is undeniably a taking in violation of international law. The taking was not for public purpose; instead, some of the art was distributed to the collections of Hitler, Göring, and Dr. Fürher. Other art was sold for the benefit of the Nazi party.[17] Moreover, the Nazi's aryanization of art collections was part of a larger scheme of the genocide of Europe's Jewish population, and it requires no semantic stretch to characterize this program as singling out "aliens" for regulation by the state. Finally, no payment of just compensation was made as a result of this taking.

Next, Plaintiff has established a substantial and non-frivolous claim that a taking in violation of international law occurred when the paintings were "donated" to the Gallery in 1948 in order to secure export licenses for other works of art. These paintings were not taken for a public purpose; Austria's own laws required their retur.. to their rightful owners. Moreover, Austria's acknowledged practice of requiring export licenses for works of art stolen by the Nazis

17. Nazi Germany is not recognized as a valid foreign sovereign. *See Weiss v. Lustig*, 58 N.Y.S.2d 547 (1945) (refusing to recognize Nazi decree as the law of a sovereign state); *Kalmich v. Bruno*, 450 F. Supp. 227 (N.D. Ill. 1978) (holding that the act of state doctrine did not apply to actions of Nazi occupation forces in Yugoslavia because this doctrine applies only to the acts of a sovereign in its own territorial jurisdiction and not to the acts of belligerent force, during wartime, in an occupied territory of an enemy nation).

singled out aliens for regulation by the state because aliens would be much more likely to seek export of these artworks than would Austrian citizens. Additionally, because Austria's laws required the return of these artworks to their rightful owners, the exchange of certain works of art for export permits on other works of art cannot be viewed as just compensation.

Therefore, Plaintiff has made out a substantial and non-frivolous claim that these works of art were taken in violation of international law.

Defendants argue that Plaintiff must first exhaust her domestic remedies regarding her claims for the artworks before seeking the intervention of the United States courts. A plaintiff cannot complain that a taking has not been fairly compensated unless the plaintiff has first pursued and exhausted the domestic remedies in the foreign state that is alleged to have caused the injury. *Greenpeace, Inc. v. State of France*, 946 F. Supp. 773, 783 (C.D. Cal. 1996). However, this exhaustion requirement is excused when the domestic remedies are a sham, are inadequate, or would be unreasonably prolonged. Restatement (Third) of Foreign Relations Law, § 713, cmt. f (1986). For the reasons stated below in section IV, regarding the doctrine of *forum non conveniens*, the Court finds that the Austrian courts provide an inadequate forum for resolution of Plaintiff's claims.

For these reasons, Plaintiff's claim meets the "taking" requirement of the expropriation exception of the FSIA.

3. Property Must Be Owned or Operated by Agency or Instrumentality of a Foreign State

The FSIA defines an "agency or instrumentality of a foreign state" as any entity that is a separate legal person, that is an organ of a foreign state, and that is not a citizen of the United States or created under the laws of any third country. Until January 1, 2000, the Gallery was an agency or instrumentality of a foreign state. On January 1, 2000, the Gallery was privatized and is no longer an organ of the Republic. Nevertheless, this change in the structure of the Gallery's operations does not divest this Court of subject matter jurisdiction because the events in question occurred prior to the Gallery's privatization. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995) (holding that jurisdiction under the FSIA over an Israeli company was appropriate where Israel owned a majority of shares of the company when plaintiffs were injured by the company's products even though subsequent changes in ownership resulted in the company no longer being considered "an agency or instrumentality" of Israel).

The paintings are owned by the Republic, but are exhibited by the Gallery. The exhibition of these paintings fulfills the "owned or operated by an agency or instrumentality" requirement. *See, e.g., Siderman de Blake*, 965 F.2d at 712.

Therefore, Plaintiff's claim meets the "owned or operated" requirement of the expropriation exception of the FSIA.

4. The Agency or Instrumentality Must Be Engaged in Commercial Activity

Finally, the agency or instrumentality must be engaged in commercial activity in the United States. "Commercial activity" is defined by the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). "The commercial character of an activity [is] determined by reference to the nature of the course of conduct of a particular transaction or act, rather than by reference to its purpose." *Id.* "[W]hen a foreign government acts . . . in a manner of a private player within [the market], the foreign sovereign's acts are "commercial" within the meaning of the FSIA." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S. Ct. 2160 (1992) (holding that the issuance of bonds by the Republic of Argentina was a "commercial activity" within the meaning of the FSIA). In determining whether a sovereign's acts are commercial, the focus of the inquiry is not whether the sovereign acts with a profit motive; "[r]ather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the ***type*** of actions by which a private party engages in trade and traffic or commerce." *Id.* (citations and internal quotation marks omitted; emphasis in the original). Therefore, while a sovereign's issuance of regulations limiting foreign currency exchange is a sovereign activity (because a private party could not ever exercise this authority), a contract by a sovereign to buy army boots or weapons is a commercial activity (because private companies can contract to acquire goods). *Id.*

Therefore, the issue before the court is whether the type of actions engaged in by the Gallery in the United States constitutes "commercial activity."[18] According to the allegations in the Complaint, the Gallery publishes a museum guidebook in English available for purchase by United States citizens, including those in the Central District, and the Gallery's collection, including the paintings at issue in this action, is advertised in the United States, including in the Central District. Moreover, the Gallery is visited by thousands of United States citizens each year, including United States citizens that reside in the Central District. Additionally, the Gallery has lent *Adele Bloch-Bauer I* to the United States in the past.

Plaintiff argues that operating a museum is an activity in which private parties engage. Indeed, the privatization of the Gallery in January 2000 bears out this argument. *Cf. Aschenbrenner v. Conseil Regional de Haute-Normandie*, 851 F. Supp. 580, 584 (S.D.N.Y. 1994) (holding that an art exposition was not a "commercial activity" within the meaning of the FSIA). Plaintiff's argument is well-founded, even though the Gallery itself operates on foreign soil. In *Siderman de Blake*, the Ninth Circuit held that a government-expropriated hotel's solicitation of American guests, the hotel's entertainment of those guests, and the acceptance of payment from credit cards and traveler's checks of those

18. The language of § 1605(a)(3) seems to limit the Court's inquiry to the nature of the activities of the agency or instrumentality, rather than to the sovereign ***and*** its agencies or instrumentalities. However, because the Court concludes that the Gallery engages in commercial activity within the meaning of the FSIA, the Court need not decide today whether this exception is so limited.

guests was sufficient commercial activity to confer jurisdiction under the FSIA. *Siderman de Blake*, 965 F.2d at 712. The Court concludes that under *Siderman de Blake*, the Gallery engages in commercial activity under the FSIA.

The Gallery also engages in commercial activity by publishing its guidebook that is available for purchase in the United States. *See Aschenbrenner*, 851 F. Supp. at 584 (suggesting that publication of a book containing photographs of an artist's works was a commercial activity). The Gallery also engages in commercial activity by advertising in the United States. *See Holden v. Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996) (holding that promotion of products in the United States by an employee hired by a foreign sovereign constituted commercial activity because private parties engage in product promotion), *cert. denied*, 519 U.S. 1091, 117 S. Ct. 767 (1997).

Defendants argue that even if the Gallery engages in commercial activity, the Court still does not have jurisdiction over the Republic. Defendant's argument is based on the assumption that the Court may exercise jurisdiction over a foreign sovereign under only the first clause of the expropriation exception, which requires that the property be present in the United States and which is inapplicable to the present claims.

This argument, however, ignores the language of § 1605(a). All the enumerated exceptions to the FSIA in § 1605(a) clearly relate to when a court may exercise jurisdiction over a foreign state. Section 1605(a) begins with the clause "(a) A foreign state shall not be immune from the

jurisdiction of courts of the United States or of the States in any case . . . ," and then goes on to list a number of circumstances in which sovereign immunity is inapplicable. The second clause of § 1605(a)(3) should be read in the disjunctive, so that a foreign state shall not be immune when expropriated property is owned or operated by the foreign state's agency or instrumentality when that agency or instrumentality engages in commercial activity in the United States. Defendants' reading of the second clause of § 1605(a)(3), limiting immunity to the agency or instrumentality, is not consistent with the language of the statute or its legislative history.[19]

For these reasons, the Court concludes that the expropriation exception to the FSIA applies to Plaintiff's claims, and Austria is not entitled to immunity.

III. Personal Jurisdiction

Defendants also argue that even if an exception to sovereign immunity applies, Plaintiff's suit still cannot be maintained unless the Court has personal jurisdiction over the Republic and the Gallery.

The legislative history of the FSIA reveals that the intent of Congress was that if one of the FSIA exceptions to immunity existed, the constitutional due process requirements of personal jurisdiction were satisfied. H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.

19. Moreover, the FSIA defines a "foreign state" as including its agencies and instrumentalities. *See* 28 U.S.C. § 1603(a).

Code & Admin. News at 6613 ("Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States. These immunity provisions, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.")

Until 1992, Ninth Circuit authority had suggested that the Court would be required in a case involving FSIA to engage in a "minimum contacts" analysis. *See Siderman de Blake*, 965 F.2d at 704 n.4 ("[T]he exercise of personal jurisdiction also must comport with the constitutional requirement of due process"); *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir. 1989) ("[I]f defendants are not entitled to immunity under the FSIA, a court must consider whether the constitutional constraints of the Due Process Clause preclude the assertion of personal jurisdiction over them."), *cert. denied*, 493 U.S. 891, 110 S. Ct. 237 (1989). Later case law, decided after the United States Supreme Court's decision in *Weltover*, suggests a different approach.

In *Weltover*, the Court explicitly declined to decide whether a foreign state is a "person" under the Due Process Clause because it found that due process had been satisfied. The Court cited to *Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S. Ct. 803 (1966), which held that States of the Union are not "persons" for purposes of the Due Process Clause. This citation suggests that the Court, in a case that properly presents the issue, would hold that foreign sovereigns are not entitled to due process protection.

Other courts, including the Ninth Circuit, have since explicitly declined to decide whether foreign sovereigns are "persons" under the Due Process Clause. *Theo. H. Davies & Co., Ltd. v. Republic of the Marshall Islands*, 174 F.3d 969 (9th Cir. 1999); *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000); *Hanil v. PT. Bank Negara Indonesia*, 148 F.3d 127, 130 (1998). In *Theo. H. Davies*, in light of the suggestion in *Weltover* that foreign sovereigns are not "persons" for purposes of the Due Process Clause, the Ninth Circuit significantly altered its previous approach and assumed, but did not decide, that foreign states are entitled to due process protection. *Theo. H. Davies*, 174 F.2d at 975 n.3 (citing *Weltover*).

Many courts considering whether they had personal jurisdiction over a foreign sovereign since *Weltover* have not been required to determine if the Due Process Clause applies to foreign sovereigns because those courts have been able to conclude without much analysis that due process has been satisfied. *See Theo. H. Davies*, 174 F.3d at 974-76; *Republic of Yemen*, 218 F.3d at 1303; *Hanil*, 148 F.3d at 130. This is because the more commonly employed exception to foreign sovereign immunity under the FSIA, the commercial activity exception, requires that the action be based on commercial activity carried on in the United States, connected with the United States, or that has a direct effect on the United States. *See* 28 U.S.C. § 1605(a)(2). When these requirements have been met, courts have been able to conclude that they have personal jurisdiction over the foreign sovereign by virtue of these contacts with the United States and that therefore the due process requirements for personal jurisdiction have been satisfied. *See Theo. H. Davies*, 174 F.3d at 974-76; *Republic of Yemen*, 218 F.3d at 1303; *Hanil*, 148 F.3d at 130.

It is less clear whether sufficient activity to satisfy the expropriation exception to foreign immunity would also satisfy due process. However, such an analysis is not required because foreign sovereigns are not "persons" for purposes of the Due Process Clause. As previously noted, Ninth Circuit case law prior to *Weltover*, by requiring a "minimum contacts" analysis, had implicitly held that foreign sovereigns are "persons" entitled to due process. *See Siderman de Blake*, 965 F.2d at 704 n.4; *Gregorian v. Izvestia*, 871 F.2d 1515. The Ninth Circuit has since retreated from this implicit holding by following the *Weltover* court's lead in assuming without deciding that due process was satisfied. *Theo. H. Davies*, 174 F.2d at 975 n.3 (citing *Weltover*).

The District Court for the District of Columbia has considered this issue in depth and has concluded that foreign sovereigns are not "persons" within the meaning of the Due Process Clause. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C.1998); *World Wide Minerals, Ltd. v. Republic of Kazakhstahn*, 116 F. Supp. 2d 98 (D.D.C. 2000) (following *Flatow*); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 49 (D.D.C. 2000) (following *Flatow* and noting that it would seem that a foreign sovereign should enjoy no greater due process rights than the sovereign states of the union). This Court finds the *Flatow* court's rationale persuasive.

The *Flatkow* court first noted that most courts have simply assumed without deciding that a foreign sovereign is a "person" for purposes of constitutional due process analysis and that this assumption has rarely been examined in depth. *Flatow*, 999 F. Supp. at 19. The *Flatow* court cited *Afram v. Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358,

1362 (7th Cir. 1985), which noted that an unexamined assumption regarding the ability of foreign corporations to object to extraterritorial assertions of personal jurisdiction was probably now "too solidly entrenched" to be questioned. The *Flatow* court rejected the notion that the unexamined assumption with which it was faced could not be questioned. So, too, does this Court.

The United States Supreme Court has held that a State of the United States is not entitled to substantive due process. *Katzenbach*, 383 U.S. at 323-24. Similarly, the United States Supreme Court has noted that "in common usage, the term 'person' does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304 (1989) (internal alterations and citations omitted); *see also Rios v. Marshall*, 530 F. Supp. 351, 372 (S.D.N.Y. 1981) (holding that foreign states are not "persons" subject to antitrust liability under the Sherman Act).

Several courts have held that the federal government, state governments, political subdivisions and municipalities within the United States are not "persons" within the meaning of the Due Process Clause. *See In re Herndon*, 188 B.R. 562, 565 n.8 (E.D. Ky. 1995) ("The Fifth Amendment accords due process of law to persons. A governmental entity is not a 'person.' The Fifth Amendment protects persons from the government; its does not necessarily protect one branch of the government from the actions of another branch."); *El Paso County Water Imp. Dist. No. 1 v. International Boundary and Water Comm'n*, 701 F. Supp. 121 (W.D. Tex. 1988); *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp.

157 (D.D.C. 1980); *State of Oklahoma v. Federal Energy Regulatory Comm'n*, 494 F. Supp. 636 (D.C. Okla. 1980), *aff'd on other grounds*, 661 F.2d 832 (10th Cir. 1981), *cert. denied sub nom., Texas v. Federal Energy Regulatory Comm'n*, 457 U.S. 1105, 102 S. Ct. 2902 (1982).

The personal jurisdiction requirement recognizes an individual liberty interest that is conferred by the Due Process Clause. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S. Ct. 2099 (1982). The personal jurisdiction requirement represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. *Id.* "It would be illogical to grant this personal liberty interest to foreign states when it has not been granted to federal, state or local governments of the United States." *Flatow*, 999 F. Supp. at 21. Accordingly, this Court holds that a foreign state is not a "person" under the Due Process Clause of the United States Constitution.

The previously-cited House Report's language is unambiguous — it states that *in personam* jurisdiction has been addressed within the requirements of the statute; the FSIA does not grant a liberty interest for the purposes of substantive due process analysis. H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6611-12. This Court joins with the *Flatow* court's observation that "[f]oreign sovereign immunity, both under the common law and now under the FSIA, has always been a matter of grace and comity rather than a matter of right under United States law." *Verlinden*, 461 U.S. at 486, *citing Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116,

3 L.Ed. 287 (1812). Where neither the Constitution nor Congress grants a right, it is inappropriate to invent and perpetuate it by judicial fiat.

IV. Effect of International Agreements on the FSIA

Defendants correctly argue that the FSIA must be interpreted subject to international agreements that were in existence at the time of the FSIA's enactment. Defendants argue that Plaintiff's claims are barred by Articles 21 and 26 of the Austrian State Treaty of 1955, 6 UST 2369, and The 1959 Austrian Exchange of Notes Constituting an Agreement Concerning the Settlement of Certain Claims under Article 26 of the Austrian State Treaty ("1959 Agreement").

Plaintiff correctly points out, however, that Article 21 of the 1955 Treaty, providing that Austria would not be required to make reparations for damages arising out of the existence of war after September 1, 1939, was an agreement that Austria need not make reparations to the Allied Forces. Other provisions of this Treaty concern themselves with Austria's responsibility regarding the return of property improperly seized from its citizens during the Nazi invasion.

The second paragraph of Article 26 concerns only heirless or unclaimed property. The paintings at issue are neither. The 1959 Agreement established a fund for settlement of certain enumerated claims, e.g., pensions, insurance policies, and bank accounts, but works of art were not among these enumerated claims. Moreover, the United States government explicitly reserved the right to pursue unknown claims

Therefore, the existing international agreements at the time the FSIA was enacted do not require granting immunity to Austria as to Plaintiff's claims; in fact, these international agreements placed responsibility on Austria to return property that was improperly seized by the Nazis.

V. *Forum Non Conveniens*

Defendants argue that Plaintiff's claims should be dismissed under the doctrine of *forum non conveniens*. Plaintiff argues that this doctrine should not be applied because no reasonable alternative forum exists.

Under the doctrine of *forum non conveniens*, a district court "may decline to exercise its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S. Ct. 252 (1981). The party moving for dismissal under the doctrine of *forum non conveniens* must demonstrate the existence of an adequate alternative forum and that the balance of relevant private and public interest factors favor dismissal. *Creative Technology, Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995). The existence of the availability of an adequate alternative forum is a threshold issue, and dismissal is not appropriate if such a forum is unavailable. *See id.* Even though a court may not dismiss on *forum non conveniens* grounds when the foreign forum does not provide the same range of remedies as are available in the home forum, the alternative forum must provide some potential avenue for redress. *Ceramic Corp. of America v.*

Inka Maritime Corp., 1 F.3d 947, 949 (9th Cir. 1993). A foreign forum is inadequate when it offers no remedy at all. *See, e.g., El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677-78 (D.C.Cir. 1996). Austria does not provide an adequate alternative forum to Plaintiff. Plaintiff's claims, if asserted in Austria, will most likely be barred by the statute of limitations of thirty years.[20] Because of California's "discovery rule" with regard to stolen works of art, and assuming as true the allegations in the Complaint, Plaintiff would not be barred on statute of limitations grounds in this forum.[21] If Plaintiff's claims are barred by the statute of limitations, she would be left without a remedy; clearly therefore, Austria is not an adequate alternative forum for Plaintiff's claims.

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20. Defendants argue that the statute of limitations is tolled for fraudulent concealment. Significantly, however, Defendants have refused to waive their statute of limitations defense to Plaintiff's claims. Defendants rely on *Kilvert v. Tambrands, Inc.*, 906 F. Supp. 790 (S.D.N.Y. 1995) in support of their motion to dismiss on *forum non conveniens* grounds; however, the *Kilvert* court dismissed the action only after the defendants agreed to waive their statute of limitations defense. Defendants' failure to agree to waive this defense is indicative of a belief that Plaintiff's claims are barred by the statute of limitations.

Defendants also argue that Plaintiff's claim under the 1998 law would not be barred based on the statute of limitations. However, Defendants' argument ignores the fact that the 1998 law created no private right of action. Defendants contend that regardless of whether the 1998 law created a private right of action, the Austrian Constitution permits a claim for the discriminatory application of this claim. However, that claim is not currently before the Court.

21. *See supra note* 10.

Further, in this action for return of artwork valued at approximately $150 million, Austria's filing fees, even when reduced pursuant to Plaintiff's fee petition, also makes Austria an inadequate alternative forum. Austria's fee structure would require Plaintiff to pay the Austrian courts a filing fee that approximates the sum total of her liquid assets. This amount varies between approximately $130,000 to $200,000, depending on the exchange rate. Additionally, in the event Plaintiff loses, Plaintiff would be required to pay costs, including attorney's fees, to the Republic and the Gallery.[22] A foreign forum's requirement that the plaintiff post a bond to proceed with litigation will generally not make the forum inadequate, unless the plaintiff is indigent or the excessively high amount of the bond makes it unduly burdensome. *See* 17 *Moore's Federal Practice*, § 111.74[2][d] (Matthew Bender 3d ed.); *see also Nai-Chao v. Boeing Co.*, 555 F. Supp. 9 (N.D. Cal. 1982), *aff'd sub nom., Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983) (noting that filing fee did not automatically render foreign forum inadequate); *cert. denied*, 464 U.S. 1017, 104 S. Ct. 549 (1983).[23] Here, it is clear that Plaintiff is not indigent. Nevertheless, the Court

22. Plaintiff would be unlikely to prevail in Austria, given the statute of limitations difficulties discussed above.

23. Defendants argue that *Cheng* requires dismissal of Plaintiff's claims. In *Cheng*, the district court held that a foreign forum was adequate for purposes of *forum non conveniens* analysis notwithstanding its burdensome filing fees, so long as the filing fees were not oppressively burdensome. The Ninth Circuit found no abuse of discretion in the district court's conclusion, but did not separately consider the district court's holding with regard to the filing fee. Therefore, *Cheng* is not controlling authority on this issue.

finds that the filing fee required by the Austrian courts is oppressively burdensome. Paying even the reduced amount would force an 85-year-old woman to expend a great majority, if not all, of her liquid assets. Moreover, Austria has appealed the reduction in filing fees, and contends that Plaintiff should be required to pay an even greater amount.

For these reasons, Defendants have failed to demonstrate that Austria provides an adequate alternative forum and therefore the Court will not dismiss Plaintiff's claims under the doctrine of *forum non conveniens*.

VI. Joinder of Necessary and Indispensable Parties

Defendants argue that the present action must be dismissed pursuant to Fed. R. Civ. P. 19(a) because Plaintiff has failed to join necessary parties.

A. Text of Rule 19(a)

Rule 19(a) provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter

> impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

Rule 19(a) provides three separate circumstances in which a person is to be considered a person to be joined if feasible (commonly referred to as "a necessary party"). First, a person is a necessary party if in the person's absence complete relief cannot be accorded among those already parties. Fed. R. Civ. P. 19(a)(1). The second and third circumstances share a common preliminary requirement: The person must claim an interest relating to the subject of the action. Fed. R. Civ. P. 19(a)(2). The second circumstance in which a person is a necessary party is when the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest. Fed. R. Civ. P. 19(a)(2)(i). Third, a person is a necessary party if the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence leaves any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Fed. R. Civ. P. 19(a)(2)(ii). If any one of these three circumstances apply, the person is a necessary party. *Shimkus v. Gersten Cos.*, 816 F.2d 1318, 1322 (9th Cir. 1987).

B. Rule 19(a)(1)

The "complete relief" clause of Rule 19(a) addresses the interest in comprehensive resolution of a controversy and the desire to avoid multiple lawsuits regarding the same cause of action. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983). Nevertheless, this provision is concerned only with "relief as between the persons already parties, not as between a party and the absent person whose joinder is sought." *Eldredge v. Carpenters 46 N. Cal. Counties Jt. Apprenticeship and Training Comm.*, 662 F.2d 534, 537 (9th Cir. 1981), *cert. denied*, 459 U.S. 917, 103 S. Ct. 231 (1982). The present action would resolve all claims between those already party to the present action; the presence of the other heirs is not required to fully adjudicate Plaintiff's claim to the paintings. This is so notwithstanding that others may assert an interest in the paintings as well.[24]

The Third Circuit has held that a party is not a necessary party based on the fact that the party might have a claim as to the property at issue in an *in rem* action. *Sindia Expedition, Inc. v. The Wrecked and Abandoned Vessel Known as the Sindia*, 895 F.2d 116 (1990) (holding that the state was not a necessary party in a controversy regarding a salvaged shipwrecked vessel based on state's assertion of ownership rights in the vessel and noting that "[t]he possibility that a successful party may have to defend its rights to the [vessel]

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24. The heirs do not dispute the proportional share due to each of them; therefore, collectively, the heirs do not assert greater than a 100% interest in the paintings.

in a subsequent suit brought by the State does not make [the state] a necessary party"). By the same token, that the absent parties here may later claim an interest in the subject of the action — the paintings — does not make them necessary parties.

The heirs are not necessary parties within the meaning Fed. R. Civ. P. 19(a)(1).

C. Rule 19(a)(2)

Under both clauses of Rule 19(a)(2), the absent party must claim an interest relating to the subject matter of the action. This interest may be a legally protected interest or an interest that "is to be determined from a practical perspective." *Aguilar v. Los Angeles County*, 751 F.2d 1089 (1985), *cert. denied*, 471 U.S. 1125, 105 S. Ct. 2656 (1985). The heirs undeniably have an interest relating to the subject matter of the action. This action seeks return of six paintings. Among them, the heirs have a 100% interest in the paintings. Plaintiff claims only a subset of this interest — 25%.

Nevertheless, the heirs do not "claim an interest" within the meaning of 19(a)(2). When persons are aware of an action but choose not to claim an interest by failing to join in the action, they are not considered necessary parties. *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (holding that the district court did not err by finding that a party who was aware of an action but chose not to claim an interest was not a necessary party under Rule 19). For this reason, the heirs are not persons who claim an interest in the action and are therefore not necessary parties under Fed. R. Civ. P. 19(a)(2)(i) or (ii).

Even if this were not the case, however, the heirs would not be necessary parties under Rule 19(a)(2)(i) or (ii) for other reasons.

D. Rule 19(a)(2)(i)

The "impair or impede" clause of Rule 19(a)(2)(i) focuses on protecting the interest of the absent parties. Absent parties are not necessary parties if their interests are adequately represented by existing parties. *See, e.g., Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999). In *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992), *cert. denied*, 509 U.S. 903, 113 S. Ct. 2993 (1993), the Ninth Circuit considered three factors in determining whether an absent party would be adequately represented by existing parties.

First, the Court considers whether "the interests of a present party to the suit are such that it will undoubtedly make all" of the absent party's arguments. Here, the parties' claims to the paintings have the same genesis: All the heirs' claims to the paintings are based on their proportional inheritance (or their parent's proportional inheritance) of Ferdinand Bloch-Bauer's estate. The arguments supporting return of the paintings are common to all the heirs.

Next, the Court considers whether the party is "capable of and willing to make such arguments." The Court finds that Plaintiff is both capable of and willing to make all arguments in support of the heirs' claims. Plaintiff is aptly represented by counsel, and the heirs' interest is also partly advanced by amicus curiae Bet Tzedek.

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Finally, the Court considers whether the absent party would "offer any necessary element to the proceedings" that the present parties would neglect to offer. Here, the absent parties would offer no additional element to the proceedings because, as explained above, the heirs' claims have a common genesis, and they have no disputes among themselves regarding the proportional interest of each.

Upon consideration of the factors enunciated by the Ninth Circuit, the Court finds that Plaintiff adequately represents the heirs' claims, and therefore, the heirs are not necessary parties under Rule 19(a)(2)(i).[25]

E. Rule 19(a)(2)(ii)

The "inconsistent obligations" clause of Rule 19(a)(2)(ii) focuses on the possibility that those already parties might be subjected to inconsistent obligations. This clause is concerned with inconsistent ***obligations***, not inconsistent ***adjudications.*** 4 *Moore's Federal Practice* § 19.03[4][d] (Matthew Bender 3d ed.). An action that merely determines the ownership rights of property does not expose any party to inconsistent obligations, notwithstanding the possibility that another party might later claim an interest in that property. *Sindia Expedition*, 895 F.2d at 123.

25. Additionally, Plaintiff has received assignments of the rights to the paintings from three of the four other heirs. With these assignments, Plaintiff represents a 75% interest in the paintings.

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F. Defendant's Remaining Arguments

Defendants also argue that, generally, joint obligees are to be considered indispensable parties in an action to set aside a contract. (Plaintiff asks the court to rescind any agreement between the Gallery and the Austrian lawyer to exchange the paintings for export permits). Defendants rely on *Nike, Inc. v. Comercial Iberica De Exclusivas*, 20 F.3d 987, 991 (9th Cir. 1994), for this proposition. In *Nike*, the Ninth Circuit noted, in dicta, that generally joint obligees are indispensable parties to an action. In *Nike*, the joint obligees were a subsidiary and its parent, and the court held that a subsidiary's assignment of rights to a parent was a collusive attempt to maintain diversity jurisdiction because the subsidiary's presence in the suit would destroy diversity. These concerns are not present in this action.

The *Nike* court relied on an earlier Fifth Circuit case that is also cited by Defendants. In *Harrell v. Sumner Contracting Co. v. Peabody Peterson Co.*, 546 F.2d 1227 (5th Cir. 1977), the court noted the general rule that joint obligees are indispensable parties. The court's rationale, however, was based on the fact that the plaintiff and the party to be joined were joint venturers and that federal courts had held that all partners are indispensable parties in actions based on partnership contracts. Additionally, like the *Nike* court, the Fifth Circuit was concerned with the plaintiff's collusive attempt to invoke the court's diversity jurisdiction. The present case is distinguishable from *Harrell*. First, because no partnership is involved, the weight of authority regarding partnership agreements and indispensability of partners upon which the Fifth Circuit relied is inapplicable here. Second,

there are no concerns with collusive attempts to invoke the Court's diversity jurisdiction because the action is properly before the Court on federal question jurisdiction. Third, there is ample reason for not applying the general rule in this action. As explained previously, the other heirs are aware of the action but have chosen not to participate and their interest will be adequately represented by Plaintiff. *Bowen*, 172 F.3d at 689; *Shermoen*, 982 F.2d at 1318. Therefore, *Harrell* is not persuasive authority on the issue of the indispensability of joint obligees.

Finally, Defendants rely on *Lomayaktew v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied sub nom.*, *Susenkewa v. Kleppe*, 425 U.S. 903, 96 S. Ct. 1492 (1976) for the proposition that in an action to set aside a contract, all parties who may be affected by the determination of the action are indispensable. In *Lomayaktew*, the party held to be indispensable was the Hopi Tribe, which was the lessor of land in an action to void lease of land to coal mining company. In *Lomayaktew*, the Plaintiff could not be joined because of sovereign immunity. Later Ninth Circuit authority, however, leads the Court to find that application of this general rule to the present circumstances is inappropriate.

Cases decided since *Lomayaktew* have held that persons who do not join in an action despite knowing of the action do not claim an interest in the subject of the action and are therefore not necessary parties. *Bowen*, 172 F.3d at 689. Moreover, recent Ninth Circuit authority has also held that when, as here, the present parties will adequately represent the interests of the absent parties, the absent parties are not necessary parties. *Shermoen*, 982 F.2d at 1318. In the context

of this action, these cases are more persuasive than a *per se* rule that joint obligees are always indispensable parties. This is especially so given the repeated instruction to district courts that Rule 19 is flexible and should be given practical application. *See, e.g., Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116 n.12, 88 S. Ct. 733 (1968); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985); *Eldredge*, 662 F.2d at 537.

Defendants also argue that another individual in Austria, a member of the Müller-Hofmann family ("Müller-Hofmann"), has made a claim for the portrait of Amalie Zuckerkandl, and that Müller-Hofmann is therefore a necessary party to this action. However, Müller-Hofmann asserts a claim to only one painting at issue in this action. Each cause of action in this action involves all six paintings. Therefore, having concluded that each cause of action is not subject to dismissal with regard to the remaining five paintings, and mindful that the Court may consider at any time in the proceedings whether the appropriate parties are joined,[26] the Court does not now consider whether Müller-Hofmann is a necessary party.

For these reasons, Plaintiff has not failed to join necessary parties and dismissal pursuant to Rule 19 is inappropriate; therefore, the Court denies Defendants Rule 12(b)(7) Motion to Dismiss for failure to join necessary parties.

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26. *See McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984) (holding that the issue of indispensability of parties may be raised at any time in the proceedings, even *sua sponte* and on appeal).

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VII. Venue

The FSIA has its own venue provision. 28 U.S.C. § 1391(f)(1)-(4). In relevant part, that provision states:

> (f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; . . . (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

Id.

Plaintiff argues that venue is proper under § 1391(f)(1) because a substantial part of the events or omissions giving rise to the claim occurred in the Central District because Austria has failed to deliver the paintings to her in Los Angeles. Defendants, however, correctly contend that the events or omissions giving rise to the claim occurred in Austria, where the paintings are located and where decisions determining the status and disposition of the paintings have been made. *See* 17 *Moore's Federal Practice* § 110.04[1] (Matthew Bender 3d ed.). Therefore, venue is not appropriate under § 1391(f)(1).

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Plaintiff also contends that venue is proper under § 1391(f)(3) because Austria is doing business in the Central District. Defendants argue that the Gallery is not doing business in the Central District, and, in any event, the Gallery's activities do not establish that the Central District is a proper venue for claims against the Republic.

Unlike the other provisions of the FSIA that use the term "commercial activity," the FSIA's venue provision uses the term "doing business." The statutory scheme of the FSIA suggests that these terms, if not interchangeable, are at least substantially similar in meaning. The Court can find no authority that suggests that a foreign agency or instrumentality that engages in "commercial activity" within a district is not also "doing business" within a district. Therefore, venue is appropriate under § 1391(f)(3) because the Gallery engages in commercial activity in the Central District as explained in section III.F.3., *supra*.[27]

Defendants correctly argue that Plaintiff did not set forth § 1391(f)(3) as a basis for venue in the Complaint. Accordingly, Plaintiff is hereby **GRANTED** fifteen (15) days'

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27. Also as explained in section II.F.3., the Gallery's commercial activities establish jurisdiction over the Republic under § 1605(a)(3). When read in conjunction with § 1605(a)(3), it seems clear that venue is proper as to the foreign state under the FSIA "doing business" provision, § 1391(f)(3), if the agency or instrumentality engages in commercial activity within the district. This construction is supported by the FSIA's definition of "foreign state", which includes agencies and instrumentalities within the term, "foreign state." 28 U.S.C. § 1603(b).

leave to amend the Complaint to set forth the basis for venue pursuant to § 1391(f)(3).[28]

VIII. Conclusion

For the reasons stated herein, Defendant's Motion to Dismiss is **DENIED.**

Plaintiff is hereby **GRANTED** fifteen (15) days' leave to amend the Complaint to set forth the basis for venue pursuant to § 1391(f)(3).

The portion of this Order holding that the Court has subject matter jurisdiction because Austria is not entitled to sovereign immunity is immediately appealable pursuant to the collateral order doctrine. *Compania Mexicana de Aviacion, S.A. v. United States*, 859 F.2d 1354 (9th Cir. 1988). For this reason, the Court hereby certifies the remaining portions of this Order for interlocutory appeal pursuant to 28 U.S.C. § 1291.

DATED this 4th day of May 2001.

s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, Judge
United States District Court

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28. This 15-day requirement will be stayed pending resolution of the interim appeal.

APPENDIX E — MINUTE ORDER AMENDING ORDER DENYING MOTION TO DISMISS, DATED MAY 4, 2001, OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION, ENTERED MAY 11, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CIVIL MINUTES - GENERAL

Case No. CV 00-8913 FMC(AIJx) Date: May 9, 2001

Title: *MARIA V. ALTMANN v REPUBLIC OF AUSTRIA, et al.*

PRESENT: *THE HONORABLE FLORENCE-MARIE COOPER, JUDGE*

ORDER ON DEFENDANT'S REQUEST FOR CLARIFICATION; ORDER AMENDING MAY 4, 2001 ORDER DENYING MOTION TO DISMISS

On May 8, 2001, Defendants filed a Request for Clarification of the Court's May 4, 2001, Order Denying Defendants' Motion to Dismiss. Defendants correctly note that the Court cited the incorrect statutory provision when it certified the issues of forum nonconveniens, joinder, and venue for interlocutory appeal. Specifically, the Court certified these issues for interlocutory appeal pursuant to 28 U.S.C. 1291; however, the statutory provision that should have been cited is 28 U.S.C. 1292(b). Accordingly, the final section, Section IX, of the Court's May 4, 2001, Order Denying Defendant's Motion to Dismiss is hereby amended to read:

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IX. Conclusion

For the reasons stated herein, Defendant's Motion to Dismiss is DENIED.

Plaintiff is hereby GRANTED fifteen (15) days' leave to amend the Complaint to set forth the basis for venue pursuant to 1391(f)(3).

The portion of this Order holding that the Court has subject matter jurisdiction because Austria is not entitled to sovereign immunity is immediately appealable pursuant to the collateral order doctrine. *Compania Mexicana de Aviacion, S.A. v. United States*, 859 F.2d 1354 (9th Cir. 1988). For this reason, the Court hereby certifies the remaining portions of this Order for interlocutory appeal pursuant to 28 U.S.C. 1292(b).

MINUTES FORM 11 Initials of Deputy Clerk AW
CIVIL - GEN

APPENDIX F — ORDER AMENDING OPINION, DATED DECEMBER 12, 2002, OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND DENYING PETITION FOR REHEARING FILED APRIL 28, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 01-56003, 01-56398

D.C. No. CV-00-08913-FMC
Central District of California, Los Angeles

MARIA V. ALTMANN, an individual,

Plaintiff - Appellee,

v.

REPUBLIC OF AUSTRIA, a foreign state; and the AUSTRIAN GALLERY, an agency of the Republic of Austria,

Defendants - Appellants.

ORDER AMENDING OPINION AND DENIAL OF REHEARING

Before: WARDLAW, W. FLETCHER, Circuit Judges, and WHYTE, District Judge.

The Opinion filed December 12, 2002, slip op. 1, and appearing at 317 F.3d 954 (9th Cir. 2002), is amended as follows:

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1. At slip opinion 16; 317 F.3d at 964, insert the following sentence after the citation to *Verlinden B.V. v. Central Bank of Nigeria* and before the sentence beginning "In 1943, the Supreme Court pronounced . . .":

> This explanation made no distinction between *in rem* and *in personam* actions.

2. At slip opinion 16; 317 F.3d at 965, insert the word "alleged" in the sentence beginning "Determining whether the FSIA . . ." so that the sentence reads in full: "Determining whether the FSIA may properly be applied thus turns on the question whether Austria could legitimately expect to receive immunity from the executive branch of the United States for its alleged complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings."

3. At slip opinion 17; 317 F.3d at 965, insert the word "allegedly" in the sentence beginning "That Austria and the United States . . ." so that the sentence reads in full: "That Austria and the United States were no longer on opposite sides of World War II at the time the Federal Monument Agency allegedly attempted to extort valid title to the Klimt paintings does not mean that Austria could reasonably expect the granting of immunity for an act so closely associated with the atrocities of the War."

4. At slip opinion 18, 317 F.3d at 966, insert the following language after the citation to the Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 (S.D.N.Y.) and before the sentence beginning "We conclude, as did Judge Wald, . . .":

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This letter strongly indicates that the State Department would not have recommended immunity as a matter of grace and comity for Austria's expropriation of the Klimt paintings. Indeed, in January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, warning that

> they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.
>
> Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons . . . resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

Dep't St. Bull., Jan. 1943, at 21-22.

With these amendments, the panel has voted unani-mously

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to deny the petition for panel rehearing. Judges Wardlaw and Fletcher have voted to deny the petition for rehearing en banc, and Judge Whyte has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing will be entertained.

APPENDIX G — BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED JANUARY 13, 2003

No. 01-56003; 01-56398

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA V. ALTMANN, an individual,

Plaintiff-Appellee

v.

REPUBLIC OF AUSTRIA, a foreign state; and the AUSTRIAN GALLERY, an agency of the Republic of Austria,

Defendants-Appellants.

On Appeal from an Order of the United States District Court for the Central District of California

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appendix G

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Appendix G

INTRODUCTION AND SUMMARY

The panel's decision in this case held that Austria is subject to suit in American courts for claims arising in Europe out of Nazi-era expropriations more than half a century ago. In so holding, the panel has created an exception to the general rule of foreign sovereign immunity never before recognized in our law. The panel reached this conclusion based upon an erroneous assessment of the principles of law that obtained in the first half of the last century, of the contemporaneous policy of the Executive Branch, and of the proper manner for analyzing retroactivity under the Foreign Sovereign Immunities Act.

The panel's belief that, without specific direction from the Executive Branch, American courts could historically exercise *in personam* jurisdiction over the foreign acts of unfriendly governments is without precedent. The language the panel cites in support of this conclusion derives from *in rem* cases, rather than *in personam* suits such as plaintiff's. Such an extension, without authorization under the FSIA or specific direction from the Executive, interjects the courts into matters of foreign policy in precisely the ways that the doctrine of immunity is intended to prevent. Nor, contrary to the panel's conclusion, had the Executive Branch made a determination to strip Austria of its immunity for suits arising out of Nazi atrocities. The panel's reliance on the so-called *Bernstein* Letter as evidence of such an exception is mistaken because that letter concerned the act of state doctrine, not the doctrine of foreign sovereign immunity. While undeniably horrific, Nazi-era expropriations would have been immune from suit in the United States when they occurred. Therefore,

the panel's exercise of jurisdiction pursuant to the expropriation exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) – an exception to immunity not recognized until some thirty years later – is impermissibly retroactive.

ARGUMENT

BECAUSE AUSTRIA WOULD HAVE BEEN IMMUNE FROM SUIT ON PLAINTIFF'S CLAIMS AT THE TIME THEY AROSE, THE FSIA'S EXPROPRIATION EXCEPTION DOES NOT RETROACTIVELY PROVIDE A BASIS FOR JURISDICTION.

A. The Foreign Sovereign Immunities Act ("FSIA") sets forth a general rule that foreign states are immune from suit in American courts. 28 U.S.C. § 1604. Courts may exercise jurisdiction over foreign states *only* if the suit comes within one of the specific exceptions to that rule established by Congress. *See ibid.* The expropriation exception, the only exception discussed by the panel, was not recognized at the time plaintiff's claims arose, and may not, therefore, be applied retroactively.

It is well-established that changes in the law that affect substantive rights do not, absent a clear congressional indication to the contrary, apply retroactively. *See INS v. St. Cyr*, 533 U.S. 289, 316 (2001). This presumption against retroactivity applies also to "jurisdictional" statutes that affect substantive rights. *See Hughes Aircraft Co. v. United States*, 520 U.S. 939, 951 (1997). Where a new jurisdictional statute "eliminates a defense to * * * suit," the change affects

"the substance" of the parties' rights and will not apply to conduct that predates the change, unless Congress explicitly provides to the contrary. *Id.* at 948.

The defense of foreign sovereign immunity, currently embodied in the FSIA, is a matter of "*substantive* federal law." *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) (emphasis added). Thus, as the Second and Eleventh Circuits have previously held, if a particular exception to the FSIA's general rule of immunity was not yet recognized at the time of the challenged conduct, that exception cannot apply retroactively. *See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1988) (application of FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), to conduct pre-dating the adoption of that exception by the Executive in 1952 would be impermissibly retroactive); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986) (same).

The definitive discussion of the United States' policy regarding foreign sovereigns' susceptibility to suit in the United States at the time plaintiff's claims arose is contained in the "Tate Letter" of May 19, 1952 from Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip B. Perlm[illegible]. *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (reprinting Tate Letter). The Tate Letter explains that from the time of *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), until 1952, the United States adhered to the "absolute theory of sovereign immunity." *Alfred Dunhill*, 425 U.S. at 711 (reprinting Tate Letter). Under this doctrine, as understood by the Department

charged with its application: "*a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign.*" *Ibid.* (emphasis added).

As the Tate Letter makes clear, the United States did not recognize an expropriation exception to sovereign immunity prior to 1952. Nor, indeed, was it recognized under the "restrictive" theory that the Tate Letter adopted. *See Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 360 (2d Cir. 1964) (under restrictive theory, foreign sovereigns continued to enjoy immunity with respect to suits challenging "strictly political or public acts about which sovereigns have traditionally been quite sensitive," including "internal administrative acts" and "legislative acts, *such as nationalization*" (emphasis added)). Rather, the expropriation exception was first recognized in American law as part of the FSIA. Because the expropriation exception was not recognized at the time plaintiff's claims arose, it cannot serve as the basis for jurisdiction in this suit.

The panel's opinion does not hold that the FSIA's expropriation exception applies retroactively to pre-1952 conduct generally, but only to Austria and, presumably, other countries allied with or occupied by Germany during World War II. There is no indication, however, that when Congress enacted the FSIA, and gave to the courts the responsibility to decide issues of immunity, Congress intended the courts to interject themselves into the arena of foreign policy by deciding, on a case-by-case basis, to deny a generally-available immunity to particular countries on the basis of their heinous conduct or the status of their relations with the United States. In fact, this Court and several others

have specifically rejected such a role for the courts. *See Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 718-19 (9th Cir. 1992); *Smith v. Socialist People's Libyan Arab Jamahiriya,* 101 F.3d 239, 244 (2d Cir. 1997); *Princz v. Federal Republic of Germany,* 26 F.3d 1166, 1174-1175, n.l. (D.C. Cir. 1994). Such an approach is, moreover, contrary to one of Congress's chief purposes in adopting the FSIA: to ensure a more uniform application of sovereign immunity principles. *See* H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606.

The above-quoted language from the Tate Letter clearly demonstrates that under the practice and policy established for the courts Austria *would* have been entitled to immunity from suit on claims such as this. The panel erred in failing to address and give effect to this contemporaneous statement by the Executive Branch of its practice regarding foreign sovereign immunity. The panel's contrary conclusion rests upon a misunderstanding of foreign sovereign immunity policy and practice during the pre-1952 period.

B. The panel's opinion relies upon the mistaken belief that, during the pre-1952 period, the courts were free to exercise *in personam* jurisdiction over foreign sovereign with respect to actions in its own territory if the United States did not have "friendly" relations with the sovereign at the time of the challenged conduct. The panel derived this view from the Supreme Court's statement in *Verlinden* that, prior to 1952, immunity was accorded "in all actions against *friendly* foreign sovereigns." *Altmann v. Republic of Austria,* 2002 WL 31770999, *7 (9th Cir. Dec. 12, 2002) *quoting Verlinden,*

461 U.S. at 486 (emphasis added by *Altmann*).[1] *Verlinden*'s use of the word "friendly" does not support the weight the panel placed upon it.

To begin, even if there were an exception for "unfriendly" nations, it is not clear that the exception would properly apply to Austria. The United States was not at war with the State of Austria. To the contrary, the United States took the view that Austria was the first country to be occupied by Nazi Germany. *See* Declaration on Austria at Moscow, *quoted in* Sen. Exec. Rpt. No. G, 84th Cong., 1st Sess. at 3 (June 15, 1955). Such subtle distinctions in our nation's foreign relations highlight the problem with courts undertaking the kinds of assessments called for under the panel's decision. The panel's approach requires courts to establish their own definition of "friendly," to assess historical relationships of the United States under this definition, and to decide how to weigh changes in relations during the period when suit might have been brought. The responsibility for drawing such lines among foreign governments and determining when to strip them of immunity can only properly be exercised by the political branches.

Moreover, as a matter of law, *Verlinden*'s reference to "friendly foreign sovereigns" does not support the proposition that our courts would have reached out to exercise *in personam* jurisdiction over foreign sovereigns for sovereign acts taken within their borders simply because the

1. The panel extended this perceived exception as well to acts committed while friendly relations admittedly existed if the act was "closely associated with the atrocities of the War." *Altmann,* 2002 WL 31770999, at *7.

United States was not on "friendly" terms with that government during the period of the challenged conduct. The history of the phrase "friendly foreign sovereigns" is instructive. *Verlinden* borrowed the phrase from the Court's decisions in *Ex Parte Peru,* 318 U.S. 578, 588-89 (1943), and *Mexico v. Hoffman,* 324 U.S. 30, 34 (1945). *See Verlinden,* 461 U.S. at 486 (citing the same). These cases were *in rem* proceedings against foreign-owned ships, and, in turn, borrowed the "friendly" foreign government terminology from prior *in rem* cases, including the leading case, *The Schooner Exchange. See Ex Parte Peru,* 318 U.S. at 588; *Hoffman,* 324 U.S. at 34. In *The Schooner Exchange,* the Court started with the general principle that "the person of the sovereign [is immune] from arrest or detention within a foreign territory" if he enters "with the knowledge and license of its sovereign." 11 U.S. (7 Cranch) at 137. The Court then went on to discuss in what circumstances this immunity extended to a foreign sovereign's warship that had entered an American harbor. The Court observed that "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace," *id.* at 141, and held, therefore, that immunity also extends to "national ships of war, entering the port of a friendly power open for their reception." *Id.* at 145-46.

This implicit indication that the United States would not refrain from seizing a belligerent nation's warships if they enter its ports during a war says nothing about whether, in the absence of specific direction from the Executive Branch, U.S. courts could exercise *in personam* jurisdiction over a non-consenting, unfriendly government with respect to acts committed within its own territory, including after normal

relations are resumed. *See Wulfsohn v. Russian Socialist Federated Soviet Republic,* 234 N.Y. 372, 373-74 (N.Y. 1923) (distinguishing between proceedings respecting "title to property situated within the jurisdiction of our courts" and suits where "[t]he government itself is sued for an exercise of sovereignty within its own territories" and rejecting argument that *in personam* jurisdiction could be exercised over Russia because it was not "friendly").

We are aware of no cases prior to 1952 in which a court asserted *in personam* jurisdiction over a foreign government for claims arising during a war between that nation and ours. Nor had the Executive Branch adopted any such blanket exception. Indeed, such an exception would likely cause the very type of "embarrass[ment] . . . to the government in conducting foreign relations" that the doctrine of immunity was intended to avoid. *See Ex parte Peru*, 318 U.S. at 588. *In personam* suits such as plaintiff's can, as a practical matter, only be pursued once the war is concluded and friendly relations resumed. But by that time, the foreign sovereign's presence in this country is again "with the knowledge and license of" our government, in which case comity would require recognition of the sovereign's immunity. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 137. If the conclusion of war on the battlefield signaled the start of the battle in the courtrooms, it would be far more difficult, if not impossible, for former adversaries to put their antagonisms behind them.

In the absence of precedent or a definitive statement of the Executive Branch creating such an exception, the courts during the period when plaintiff's claims arose would

not have created such an exception on their own. *See Hoffman*, 324 U.S. at 34-35 (in the absence of a specific recommendation from the Executive, courts must decide question of immunity "in conformity with the principles accepted by the department of the government charged with the conduct of our foreign relations").

Finally, the panel's opinion creates the anomaly of imputing to the "absolute" theory an exception to immunity that does not exist under either the restrictive theory of immunity or the FSIA, neither of which recognizes a general exception to immunity for acts committed while another country is "unfriendly" with the United States. *See* 28 U.S.C. § 1604 ("a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607"); *Princz*, 26 F.3d at 1171-75 (Germany's conduct during World War II immune under FSIA). *Cf. Saudi Arabia v. Nelson*, 507 U.S. 349, 362 n.5 (1993) (observing that, under Tate Letter regime, the State Department "recognized immunity with respect to claims involving the exercise of the power of the police or military of a foreign state"). Had an exception for "unfriendly" governments existed under the "absolute" theory, such an exception would presumably have continued to be recognized as subsequent changes narrowed the scope of immunity. Thus, the absence of such an exception today is strong evidence that no such exception existed in the 1930s and 40s.

C. The panel's belief that the Executive Branch had in fact adopted a policy after the war to deny Germany and Austria immunity from Nazi-era claims rests upon a misreading of the historical evidence. The panel's opinion

rests largely on a second letter by Mr. Tate, the so-called "Bernstein Letter," submitted to the Second Circuit in *Bernstein v. N.V. Nederlandshe-Amerikaansche,* 210 F.2d 375, 376 (2d Cir. 1954) ("*Bernstein II*"). The *Bernstein* Letter stated that the State Department's policy was "to relieve American courts of any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." April 13, 1949 letter of Jack B. Tate, *reprinted in Bernstein II*, 210 F.2d at 376. The *Bernstein* Letter did not, however, address the doctrine of foreign sovereign immunity. Rather it concerned the act of state doctrine, *i.e.,* a court's ability to pass on the validity of a foreign government's acts in a case that is properly within its jurisdiction.

In *Bernstein,* the plaintiff sued to recover commercial property that the Nazis had confiscated from him without compensation. *See Bernstein v. N.V. Nederlandshe-Amerikaansche,* 173 F.2d 71, 72 (2d Cir. 1949) ("*Bernstein I*"). Significantly, however, the defendant in *Bernstein* was not a foreign government, but a Dutch corporation. *Ibid.* The Second Circuit had initially applied the act of state doctrine, pursuant to which it refused to "pass on the validity of acts of officials of the German government." *Bernstein II*, 210 F.2d at 375. The *Bernstein* Letter addressed solely that issue. The *Bernstein* Letter does not speak to the susceptibility of the German government to suit in our courts, but instead concerns only the courts' "jurisdiction to *pass upon the validity of the acts of Nazi officials*." *Bernstein II*, 210 F.2d at 376 (reprinting letter) (emphasis supplied). *See also* Nov. 26, 1975 Letter of Legal Adviser Monroe Leigh to the Solicitor General (characterizing *Bernstein* Letter as "advis[ing] that the *act of state doctrine* need not apply to a

class of cases involving Nazi confiscations" (emphasis added)), *reprinted in Alfred Dunhill,* 425 U.S. at 706, 708.

The Supreme Court has recognized that "[t]he act of state doctrine, . . . although it shares with the immunity doctrine a respect for foreign states," is distinct from it. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 438 (1964) (applying act of state doctrine, though foreign government instrumentality had waived immunity by invoking the court's jurisdiction). The significance of this distinction was recognized at the time of the *Bernstein* and Tate letters by the Second Circuit. In *Zwack v. Kraus Bros.,* 237 F.2d 255 (2d Cir. 1956), plaintiff sued to stop an American company from using a trade name that the Hungarian government had expropriated. The defendant sought to have the suit dismissed both on act of state grounds and for plaintiff's failure to join Hungary as an indispensable party. With respect to the act of state doctrine, the Second Circuit declined to recognize the validity of Hungary's uncompensated expropriation, citing the United States' policy declared in *Bernstein II. See id.* at 260-61. At the same time, however, the Second Circuit recognized that the Hungarian government itself was "not subject to the jurisdiction of the court below unless its should voluntarily appear." *Id.* at 259.

Here, in contrast, the panel's decision confuses these distinct concepts. The panel's extension of the *Bernstein* Letter policy from the act of state context to the field of sovereign immunity is especially untenable in light of the author's own implicit rejection of such an interpretation. The *Bernstein* Letter was authored by the same person who wrote the Tate Letter only three years later. The panel's reading

creates a conflict between the two letters that did not exist and has never been thought to exist.

Contemporaneous conduct concerning the redress of Nazi-era wrongs further supports the conclusion that foreign governments, including Austria, were recognized to be absolutely immune from private litigation in U.S. courts on claims arising out of the Holocaust. The United States committed considerable energy to obtaining the return of property and some measure of compensation for the victims of the Holocaust both during the occupation and thereafter. In post-war treaties with both Germany and Austria, the United States obtained promises on the part of those governments to provide for the return of confiscated property, and in some cases the United States negotiated agreement for the payment of certain claims. *See, e.g.*, State Treaty for the Re-establishment of an Independent and Democratic Austria, 6 U.S.T. 2269, Art. 26 (May 15, 1955) (providing for return by Austria of all property confiscated on account of the racial origin or religion of the owner); Dept. of State Bulletin, July 9, 1956 at 66 (announcing procedures adopted under Austrian law for compensation of persecutees who had fled Austria); Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, 10 U.S.T. 1158 (May 22, 1959) (establishing administrative settlement fund for certain property claims); Convention on the Settlement of Matters Arising out of the War and the Occupation, as amended, 6 U.S.T. 4411 (October 23, 1954) (Germany).

The common theme of these arrangements is that they envision restitution or compensation under schemes adopted as part of domestic German or Austrian law or through

diplomatic arrangements. In none of these agreements is there any statement that private parties could sue the governments of Germany or Austria in foreign courts as an alternative means of redress. *Cf. Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428, 442 (1989) (holding that even a treaty "stat[ing] that compensation shall be paid for certain wrongs" by foreign government does not imply an abrogation of immunity from private suit). Likewise, it does not appear that prior to 1992, any plaintiff even *attempted* to sue Germany or Austria in American courts for Nazi-era atrocities. And, significantly, prior to this litigation, the two courts of appeals to consider such suits dismissed them for lack of jurisdiction. *See Princz*, 26 F.3d at 1176; *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001). The absence of any reference to private litigation in American courts against the German or Austrian governments in the United States' extensive diplomatic efforts to obtain compensation for the victims of Nazism and the similar absence of any attempt by a private party to sue Austria or Germany for Nazi-era atrocities during the period immediately following the war evidence a common understanding during the contemporaneous period that these governments were immune from such suit in the courts of the United States.

D. The various "additional reasons" that the opinion gives in support of its conclusion are also flawed and not relevant to determining whether an FSIA exception should apply retroactively. For example, it is irrelevant to the sovereign immunity inquiry that, as the panel observes, certain of the individuals responsible for Nazi atrocities were prosecuted criminally at Nuremberg. *See Altmann*, 2002 WL

31770999, at *9. The fact that individual Nazi officials could be criminally prosecuted in an international tribunal does not in any way suggest that the Austrian government was subject to suit by private plaintiffs in American courts. Indeed, individual officials are frequently subject to suit in circumstances where the sovereign retains its immunity. *See, e.g., Alden v. Maine,* 527 U.S. 706, 757 (1999). Neither the Executive nor the Congress has ever established a "war-crimes" exception to state immunity. *See Siderman de Blake,* 965 F.2d at 718-19.

Nor is it relevant that Austria adopted the restrictive theory of immunity in the 1920s. *Cf. Altmann,* 2002 WL 31770999, at *8. The panel does not cite any instance in which a foreign sovereign was denied immunity because it applied the restrictive theory of immunity in its own courts, and we are aware of none. Indeed, although, according to the Tate Letter, Peru was one of the countries that had previously accepted the restrictive theory of immunity, *see Alfred Dunhill,* 425 U.S. at 713, the United States certified, in 1942, the immunity of a Peruvian commercial vessel, *see Ex Parte Peru,* 318 U.S. at 579-81. The panel's analysis makes a foreign government's susceptibility to suit turn on "the defendant country's acceptance of the restrictive principle of sovereign immunity." *Altmann,* 2002 WL 31770999, at *9 (indicating that Russia, China, and Mexico, which had not accepted the restrictive theory, would be immune from suit for conduct during the pre-1952 era). But, as we previously noted, one of Congress's purposes in adopting the FSIA was to ensure a more uniform application of sovereign immunity principles. *See* H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606. It would not have wanted

application of the FSIA to vary among countries, especially since the Executive Branch had never previously established such a rule.

Even if such distinctions were appropriate, Austria's adoption of the restrictive theory in the 1920's would still be inapposite to assessing Austria's immunity with respect to plaintiff's claim because, as noted above, the restrictive theory did not permit jurisdiction over a foreign government's sovereign or public acts, such as expropriation of property within its territory. *See Verlinden,* 461 U.S. at 486-87; *Victory Transport,* 336 F.2d at 360 (under restrictive theory foreign sovereigns retained immunity with respect to suits challenging "internal Administrative acts" and "legislative acts, *such as nationalization*" (emphasis added)). *See also Saudi Arabia v. Nelson,* 507 U.S. at 361 (citing same with approval).

Finally, the panel asserts that, even if Austria had an expectation of immunity from suit for discriminatory expropriations, such an expectation "would be due no deference," *Altmann,* 2002 WL 31770999, at *10. This assertion is contrary to the Supreme Court's holding in *Hughes.* In *Hughes,* there was no question that the defendant's alleged fraud against the United States was wrongful at the time it was committed, and that the conduct was even subject to suit by the federal government. 520 U.S. at 948. Nonetheless, the Court held that the presumption against retroactivity applied to a statute that allowed a new plaintiff, a private person, to bring the suit on behalf of the United States. *Id.* at 951. Thus, there is no basis for the panel's assertion that the presumption against retroactivity applies only to fields of law such as "contracts . . . in which courts have traditionally deferred to the 'settled expectations' of the parties." *Altmann,* 2002 WL 31770999, at *10.

Appendix G

CONCLUSION

For the foregoing reasons, the petition for rehearing and suggestion for rehearing en banc should be granted.[2]

Respectfully submitted,

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2. Because of space constraints, the United States has limited its arguments in this brief to the question of the Executive Branch's sovereign immunity practice prior to 1952, an issue as to which the government has a unique ability to speak. If the Court does grant rehearing, and calls for a new round of briefing, the United States reserves its right to address as well the other points raised in Austria's petition.

Appendix G

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Appendix G

STATUTORY ADDENDUM

28 U.S.C. § 1605(a) (3).

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

* * * * *

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

APPENDIX H — COMPLAINT DATED AUGUST 22, 2000

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 00-08913 FMC AIJx

MARIA V. ALTMANN, an individual,

Plaintiff,

v.

REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY, an agency of the REPUBLIC OF AUSTRIA,

Defendants.

Appendix H

COMPLAINT AGAINST THE REPUBLIC OF AUSTRIA AND THE AUSTRIAN GALLERY FOR:

(1) DECLARATORY RELIEF,
(2) REPLEVIN,
(3) RESCISSION,
(4) DAMAGES FOR EXPROPRIATION AND CONVERSION,
(5) DAMAGES FOR VIOLATION OF INTERNATIONAL LAW,
(6) IMPOSITION OF CONSTRUCTIVE TRUST,
(7) RESTITUTION BASED ON UNJUST ENRICHMENT, AND
(8) DISGORGEMENT PURSUANT TO CAL. BUS. & PROF. CODE § 17200 ET SEQ.

SUMMARY

This case seeks recovery of six paintings by Gustav Klimt owned by Maria V. Altmann, but in the wrongful possession of the Republic of Austria and the Austrian Gallery.

Mrs. Altmann was born in Austria but fled, for her life, when Austria delivered itself into the hands of the Nazis in 1938. In 1938 as well, the Nazis and their Austrian accomplices seized the property not only of Mrs. Altmann, but the rest of her family, including all property of her uncle, Ferdinand Bloch-Bauer. They did so for no other reason than because Altmann and her family were Jewish. Included among Ferdinand's possessions at the time were six fabulous paintings by Gustav Klimt (copies of which are reproduced

Appendix H

as Exhibit A hereto), consisting of two portraits of his wife (*Adele Bloch-Bauer I* and *Adele Bloch-Bauer II*), three landscapes (*Beechwood; Apple Tree I; Houses in Unterach am Attersee*), and a portrait of a close friend (*Amalie Zuckerkandl*). A seventh painting (*Schloss Kammer am Attersee III)* had been donated by Ferdinand to the Austrian Gallery in 1936, prior to the Austrians' rejection (and for those who were unable to flee, murder) of its Jewish population.

Ferdinand died in exile in Zurich, childless and a widower, in November 1945. He left his entire estate to three of his brother Gustav Bloch-Bauer's children: 25% to Mrs. Altmann, then living in Los Angeles; 25% to Robert Bentley, then living in Vancouver, Canada; and 50% to Luise Gattin, then living in Zagreb, Yugoslavia). His will was admitted to probate in Zurich in 1947. Mrs. Altmann, age 84, is the last surviving named heir.

Notwithstanding Ferdinand's bequest to his nieces and nephews; notwithstanding the fact that the paintings were stolen from Ferdinand; notwithstanding the fact that no party took good title from the defeated Nazis and their Austrian accomplices; and notwithstanding that the Republic of Austria had the legal – not to say moral – obligation to deliver the paintings to the heirs upon probate of Ferdinand's will, the Republic of Austria and the Austrian Gallery did not do so. Instead, motivated entirely by a now-admitted hatred of the Jews that continued even *after* they and their Axis partners were defeated in World War II and *after* the depths of the Holocaust were exposed, the Republic of Austria and the Austrian Gallery extorted the heirs out of their possessory

rights in exchange for purported "export permits" allowing the heirs to retrieve other property stolen from them.

Only in 1999 did the true facts about the Republic of Austria's and the Austrian Gallery's wrongful possession begin to come to light. Prior to then, the Republic of Austria and the Austrian Gallery hid these facts from the heirs and from the world, claiming – falsely – that they in fact had taken good title, honestly acquired. To their continuing disgrace, the Republic of Austria and the Austrian Gallery refuse to return the paintings or to pay for them.

There being no other recourse, Maria V. Altmann alleges against the Republic of Austria and the Austrian Gallery as follows:

Plaintiff MARIA V. ALTMANN alleges as follows:

THE PARTIES

1. Plaintiff MARIA V. ALTMANN ("ALTMANN"), is an individual residing in Los Angeles, California. ALTMANN was born in Vienna, Austria on February 18, 1916. In October 1938, after the annexation of Austria by Nazi Germany, she fled because of religious and racial persecution by the Nazis. (For example, before leaving Vienna her jewelry and other valuable possessions were confiscated by the Gestapo and her husband, Fritz Altmann, was imprisoned in the infamous Dachau concentration camp for several months and subsequently placed under house arrest.) ALTMANN came to the United States in 1940, settled in Los Angeles County in 1942 and has resided in Los Angeles

County ever since. ALTMANN became an American citizen in 1945.

2. ALTMANN is heir to 25% of the estate of her uncle Ferdinand Bloch-Bauer. ALTMANN brings this claim for herself and on behalf of the entire estate of Ferdinand Bloch-Bauer.

3. Defendant REPUBLIC OF AUSTRIA is a foreign state, as defined in 28 U.S.C. § 1603(a), located in Central Europe.

4. Defendant AUSTRIAN GALLERY is an art museum in Vienna, Austria. The AUSTRIAN GALLERY is also known in German as the *Österreichische Galerie Belvedere*, and has been formerly known as the *Moderne Galerie*, the *Österreichische Staatsgalerie*, and the *Galerie des XIX. Jahrhunderts*.

5. At all relevant times herein, and until January 1, 2000, the AUSTRIAN GALLERY was an agency and instrumentality, as defined in 28 U.S.C. §1603(b), of the REPUBLIC OF AUSTRIA, owned and operated by the REPUBLIC OF AUSTRIA (or during the Nazi era, by Germany). On January 1, 2000, the AUSTRIAN GALLERY was purportedly divested from the federal government and made a separate legal entity in Austria. However, the REPUBLIC OF AUSTRIA continues to own all of the paintings in the museum operated by the AUSTRIAN GALERY, including the paintings that are the subject of this action. The REPUBLIC OF AUSTRIA continues to control, operate and fund the AUSTRIAN GALLERY. Because all of

the facts alleged below concern events prior to January 1, 2000, the AUSTRIAN GALLERY and the REPUBLIC OF AUSTRIA are referred to herein collectively as the "AUSTRIAN GALLERY."

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction and personal jurisdiction over the REPUBLIC OF USTRIA and the AUSTRIAN GALLERY under 28 U.S.C. §1330 because these are claims as to which neither party is entitled to immunity under 28 U.S.C. § 1605-7 (the Foreign Sovereign Immunities Act ("FSIA")). *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. Cal. 1992). Process shall be served on both defendants pursuant to 28 U.S.C. § 1608.

7. ALTMANN is a citizen of California. The AUSTRIAN GALLERY is an agency and subject of the REPUBLIC OF AUSTRIA, a foreign state. The amount in controversy is approximately $150 million.

8. This action concerns rights in property expropriated in violation of international law, namely six paintings by Gustav Klimt which were taken from Ferdinand Bloch-Bauer as a result of discriminatory taxes levied by the Nazis. After the Second World War, the AUSTRIAN GALLERY withheld these paintings from Ferdinand's heirs by deception, fraud and duress utilized in furtherance of the violations of international law committed by the Nazis. The truth was revealed only recently, but the AUSTRIAN GALLERY has still refused to relinquish the paintings to Ferdinand's heirs.

9. Before January 1, 2000, the property at issue was in the possession of the AUSTRIAN GALLERY, an entity that was an agency and instrumentality of the REPUBLIC OF AUSTRIA. Since January 1, 2000, the property at issue is in the possession of the REPUBLIC OF AUSTRIA and housed in the museum operated by the AUSTRIAN GALLERY.

10. The AUSTRIAN GALLERY is engaged in commercial activity in the United States.

a) The AUSTRIAN GALLERY edits and publishes a museum guidebook in English, which is sold to U.S. citizens and is available for purchase in the United States, and in Los Angeles County. The AUSTRIAN GALLERY asserts U.S. copyright ownership over this book, which is also published in New York. One of the looted artworks at issue in this action, the portrait of ALTMANN's aunt, *Adele Bloch-Bauer I*, is reproduced on the cover of the guidebook.

b) The AUSTRIAN GALLERY is visited by thousands of U.S. citizens each year, and accepts entrance fees from these visitors. The artworks that are the subject of this action are some of the main attractions of the museum. In its gift shop, the AUSTRIAN GALLERY sells memorabilia, including numerous images of the looted artworks at issue in this action, to U.S. citizens. The AUSTRIAN GALLERY accepts payment by U.S. credit card for these purchases.

c) The AUSTRIAN GALLERY engages in and receives the benefit of tourist advertising in the United States conducted by the official Austrian National Tourist Office,

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a non-profit agency sponsored and controlled by the REPUBLIC OF AUSTRIA, which has offices in various cities in the United States, including an office in Los Angeles, California. This advertising often features the AUSTRIAN GALLERY's famous collection of paintings by Gustav Klimt, which is comprised in substantial part by the looted artworks that are the subject of this action. Currently, the AUSTRIAN GALLERY is promoting its fall show entitled "Gustav Klimt and the Image of Women in Europe," which will be on display from September 20, 2000 to January 7, 2001. The looted pictures that are the subject of this action will be the main works in this exhibition. The AUSTRIAN GALLERY is borrowing artworks from the United States for this exhibition. The AUSTRIAN GALLERY is actively promoting this exhibition in America and towards Americans with the intention of attracting American tourists to this exhibition for the purpose of charging them entrance fees and selling merchandise to them.

d) The AUSTRIAN GALLERY has in the past also loaned artworks, including, upon information and belief, at least one of the works at issue in this action, *Adele Bloch-Bauer I,* to museums in the United States, and receives reciprocal benefits thereby.

e) In sum, the AUSTRIAN GALLERY uses the looted artworks at issue in this action for commercial activities directed at U.S. citizens, including citizens of Los Angeles, California.

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11. The REPUBLIC OF AUSTRIA is engaged in numerous other commercial activities in the United States, and in Los Angeles County in particular.

a) The REPUBLIC OF AUSTRIA has a consular office in Los Angeles, California, which serves to promote Austrian cultural and business interests in California and the Western United States.

b) The REPUBLIC OF AUSTRIA actively promotes its cultural interests in Los Angeles, including for example the interests of Austrian filmmakers. Representatives of the Austrian Federal Ministry for Education and Culture routinely visit Los Angeles as part of their mission to promote Austrian culture.

c) The Austrian National Tourist Office, a non-profit agency sponsored and controlled by the REPUBLIC OF AUSTRIA, has an office in Los Angeles. It conducts advertising campaigns promoting tourism to Austria in California and throughout the United States.

d) The REPUBLIC OF AUSTRIA owns real property in Los Angeles, which is used to promote Austrian business interests.

12. Venue is proper in this District under 28 U.S.C. § 1391(f)(1) because the REPUBLIC OF AUSTRIA and the AUSTRIAN GALLERY are in breach of their obligation to deliver the six Klimt paintings to ALTMANN in this District, and because ALTMANN presently resides and resided in this District at the time of the misappropriation of the property

at issue from her and afterwards. There is no other venue in the United States that would be more appropriate for this action than Los Angeles County. Austria is not a feasible venue for this action because the Austrian courts require payment of fees in proportion to the amount in controversy. In this case, those fees far exceed the value of ALTMANN's assets. ALTMANN applied to the Austrian courts for a waiver of the fees, which was only partially granted so that ALTMANN would have been required to expend all of her available assets other than her house – including her entire life savings – in order to proceed. The REPUBLIC OF AUSTRIA appealed this ruling, seeking to raise the level of costs even higher. As a result, ALTMANN cannot afford to proceed in Austria. Thus, there is no reasonable venue other than this court for this important matter to be heard.

BACKGROUND FACTS

The Bloch-Bauer Family Before The War

13. ALTMANN was born into the affluent Jewish Bloch-Bauer family in Vienna, Austria in 1916. Every Sunday she and her four older siblings would have brunch over at the beautiful home owned by her uncle Ferdinand and aunt Adele. Ferdinand was her father's brother; Adele was her mother's sister. Together, the two couples had combined their names to form the Bloch-Bauer family. Ferdinand's home, a large building on one of the finest streets in Vienna, was gorgeously decorated with fine artworks, tapestries, porcelain and furniture.

14. Ferdinand was a patron of Gustav Klimt and owned seven of his most important paintings, which are the paintings at issue in this case: *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Schloss Kammer am Attersee III; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl*. Reproductions of these paintings are attached hereto as Exhibit A.

15. Ferdinand was a citizen of Czechoslovakia with his principle residence (until 1938) in Vienna, Austria. The Klimt paintings were housed in his large home located at Elisabethstrasse 18 in Vienna.

16. When Adele died suddenly of meningitis in 1925, Ferdinand created a memorial room for her with the two full-length portraits of her and all four landscapes by Klimt. A seventh Klimt painting, the portrait of *Amalie Zuckerkandl*, was in Ferdinand's bedroom.

17. When Adele died, she left behind a short will that asked, but did not require, that her husband consider donating the two portraits and four landscapes to the AUSTRIAN GALLERY after his death.

18. Ferdinand's brother, Gustav Bloch-Bauer (ALTMANN's father), an attorney, was named the executor of Adele's estate. In the ensuing probate proceedings in Vienna, Austria, the Klimt paintings were declared by Gustav to be Ferdinand's property, not Adele's. Gustav also stated that Ferdinand was not bound by his wife's wishes with respect to the Klimt paintings. The Klimt paintings were not treated as part of Adele's estate during the administration of

the probate proceedings. The AUSTRIAN GALLERY was given notice of the proceedings.

19. Although the paintings belonged to Ferdinand, and not his wife, Gustav stated in 1926 that Ferdinand intended to fulfill his wife's wishes although he was not legally required to do so. However, Ferdinand did not execute any written document purporting to confirm this alleged intention to donate the paintings. Therefore, at no time was Ferdinand obligated to donate the paintings to the AUSTRIAN GALLERY.

20. In 1936, Ferdinand delivered one Klimt painting, *Schloss Kammer am Attersee III*, to the AUSTRIAN GALLERY at the request of the director of the AUSTRIAN GALLERY, Dr. Martin Haberditzl. The other six Klimt paintings remained in Ferdinand's possession until the Nazi invasion in 1938.

Escape From Austria

21. In December 1937, ALTMANN (age 21) was married. Her husband Fritz Altmann was the younger brother of the cashmere sweater manufacturer Bernhard Altmann. As a wedding gift, Ferdinand gave ALTMANN a diamond necklace and earrings that had once belonged to Adele. After just two months of marriage, in March 1938, the Nazis annexed Austria. Fritz was arrested and sent to Dachau as a hostage to force his brother, who had escaped to France, to sign over his foreign business accounts to the Nazis. The Gestapo took ALTMANN's jewelry, sending her diamond necklace to the Nazi leader Hermann Göring as a present for his wife.

22. After several months in prison, Fritz was ransomed by his brother and released from Dachau. ALTMANN was taken by the Gestapo to Berlin to seal the deal. Although Fritz was subsequently placed under house arrest, he and ALTMANN managed to escape on the way to a doctor's appointment. With Bernhard's help, they fled over the border to the Netherlands where they were met by Bernhard and flown to Liverpool, England, where the British had invited Bernhard to build a new sweater factory. ALTMANN and Fritz soon came to the United States and in 1942 reached Los Angeles, where ALTMANN has resided ever since. ALTMANN became a U.S. citizen in 1945.

23. Ferdinand, who was Jewish and had supported efforts to resist the Nazis prior to the annexation of Austria, fled the country ahead of the Nazis in March 1938 to avoid persecution. Ferdinand ultimately settled in Zurich, Switzerland, where he remained until his death in November 1945. Ferdinand fled first to his summer home in Czechoslovakia, a large castle and estate outside Prague. When the Nazis took the Sudetenland (western Czechoslovakia), Ferdinand fled to Zurich, Switzerland, and his estate outside Prague was used as the principal residence for the Nazi commander of the so-called Protectorate, Reinhard Heydrich. Heydrich, one of the principal architects of the Nazi's "Final Solution" for the extermination of European Jewry, was leaving Ferdinand's castle when he was assassinated in 1942.

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The Looting

24. In April and May 1938, the Nazis levied enormous taxes against Ferdinand in Vienna because he was Jewish. The imposition of these taxes was motivated by religious and racial animus.

25. In exile in Switzerland, Ferdinand was cut off from his family and all his possessions. The sugar company he directed was aryanized, and Ferdinand's shares held in Swiss banks were handed over to the Nazis. Ferdinand's home in Vienna was transferred to the railroad for its new headquarters. The artworks were plundered. In early 1939, a large group of Nazi and museum officials, including representatives of the AUSTRIAN GALLERY, met in Ferdinand's palais to discuss dividing up the enormous art collection. His famous 400-piece porcelain collection was sold at a public auction, with the best pieces going to Vienna's museums. Some of his 19th century artworks by Austrian masters were taken and given to Adolf Hitler and Hermann Göring. Others were bought for Hitler's planned museum in Linz. Dr. Erich Führer, the Nazi lawyer liquidating the estate, was given permission by Hitler's museum director Hans Posse to take a few paintings for his own personal collection in consideration for his service to the Third Reich.

26. Dr. Führer disposed of Ferdinand's six remaining Klimt paintings as follows:

a) In October 1941, Dr. Führer traded two Klimt paintings — *Adele Bloch-Bauer I* and *Apple Tree I* — to the AUSTRIAN GALLERY in exchange for the return of the

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painting *Schloss Kammer am Attersee III*, which Ferdinand had delivered to the AUSTRIAN GALLERY in 1936.

b) *Schloss Kammer am Attersee III* was subsequently sold by Dr. Führer to Ingeborg and/or Gustav Ucicky (an illegitimate son of Gustav Klimt who was a successful director of Nazi propaganda films) for approximately 6,000 Reichsmarks.

c) In November 1942, the painting *Beechwood* was sold by Dr. Führer to the Museum of the City of Vienna (*Wiener Städtische Sammlung)* for 5,000 Reichsmarks.

d) In March 1943, the AUSTRIAN GALLERY purchased the painting *Adele Bloch-Bauer II* from Dr. Führer for 7,500 Reichsmarks.

e) Dr. Führer kept the painting *Houses in Unterach am Attersee* for himself.

f) The portrait of *Amalie Zuckerkandl* also left the collection during this time and ended up in the hands of the art dealer Vita Künstler.

27. By early 1943, Ferdinand's entire art collection, including all the Klimt paintings, was liquidated and expropriated. The liquidation and expropriation of Ferdinand's estate were accomplished without his consent and in violation of international law. The liquidation was motivated by religious and racial hatred and occurred without payment of any just or fair compensation. In his second-to-last will, dated Oct. 8, 1942, written while in exile in Zurich,

Switzerland, Ferdinand wrote: "In an illegal manner, a tax penalty of one million Reichsmarks was imposed and my entire estate in Vienna was confiscated and sold."

Post-War Hostilities

28. Ferdinand died on November 13, 1945 in Zurich, Switzerland, several months after the War ended, having taken preliminary steps to retrieve his stolen property. In his last will, dated October 22, 1945, he revoked all prior wills and left his entire estate to two nieces (including plaintiff ALTMANN) and one nephew. He made no bequest to the AUSTRIAN GALLERY.

29. The government of Austria in the post-War period after 1945 was extremely hostile to restitution claims by exiled Jews. For example, at the end of the War, in April 1945, Dr. Karl Renner, a noted legal scholar, chancellor and post-war president of Austria, wrote:

> Restitution of property stolen from Jews, this [should be] not to the individual victims, but to a collective restitution fund. The establishment of such and the following foreseeable arrangements is necessary in order to prevent a massive, sudden flood of returning exiles. A circumstance, that for many reasons must be paid very close attention to. . . . The restitution to the victims cannot follow naturally. As soon as the property of the fund, which shall serve to compensate collectively all of the robbed individuals, is established, shares will be given out, for each pro rata based on the

> suffered damages — not by the measure of whether a person's property is completely, partially or not at all recoverable; this collective procedure naturally provides that claims can only be satisfied in relation to the recovered property and only after the completion of investigation, prosecution and return of valuables (that is after years!). . . . Basically the entire nation should be made not liable for damages to Jews.

30. This overwhelming hostility to the claims of Jews on the part of the Austrian government carried over from the Nazi period into the post-War period and placed every Jewish family with claims against the government in a very precarious position. If a claimant was to have any success at all, deals had to be made to assuage the government ministers and their cohorts, who in many cases were as anti-Semitic as their Nazi predecessors.

31. On May 15, 1946, the REPUBLIC OF AUSTRIA enacted a law declaring that all transactions which were motivated by discriminatory Nazi ideology were to be deemed null and void. In effect, this law should have nullified all of the transactions entered into by Dr. Führer during the liquidation and expropriation of Ferdinand's estate. Although the law appeared satisfactory on its face, in practice restitution was far from simple. The REPUBLIC OF AUSTRIA frequently put up legal roadblocks to restitution, such as demanding repayment of the purchase price before returning property to its Jewish owners, even though, as in Ferdinand's case, the Jewish owners had never received the payment. The restitution process in Austria after the War was imperfect, to say the least.

32. Under the law of Austria, artworks which were deemed to be important to Austria's cultural heritage could not be exported from the country, and no artworks could be exported without the permission of the Austrian Federal Monument Agency (*Bundesdenkmalamt*). ALTMANN alleges that the application of this law to Jews who were forced to flee Austria, or to their heirs who were attempting after the War to recover property left in Austria, was discriminatory and in violation of international law.

33. After the War, it was the practice of the AUSTRIAN GALLERY and the Federal Monument Agency to use the export permit laws to force Jews to donate or trade valuable artworks to the museum in exchange for export permits for other works. This practice has recently been declared to have been illegal, unethical and immoral extortion by the REPUBLIC OF AUSTRIA. ALTMANN alleges that this practice itself violated international law, and was an act in furtherance of the expropriations in violation of international law committed by the Nazis.

34. The Allies unwittingly facilitated the REPUBLIC OF AUSTRIA's extortionate practices. They had collected looted artworks and held them in the Art Collecting Point in Munich, Germany. However, individual applicants were not permitted to retrieve their property directly. Rather, the artworks would only be returned to their country of origin, which was then responsible for determining whether the artworks should be restituted. The REPUBLIC OF AUSTRIA used this procedure and laws against exporting cultural items to obtain and hold Nazi-looted artworks hostage. The Austrian Federal Monument Office routinely demanded

donations to federal museums before it would permit any artworks to be returned and exported to their former owners, most of whom remained outside Austria. Ferdinand's heirs were victims of this illicit practice.

The Heirs Try To Recover Ferdinand's Property

35. On May 23, 1947, the Zurich District Court recognized ALTMANN as the heir to 25% of Ferdinand's estate. At the time, ALTMANN was a U.S. citizen residing in Los Angeles County. ALTMANN's older brother Robert Bentley of Vancouver, Canada, and sister Luise Gattin of Zagreb, Yugoslavia, were recognized as heirs of 25% and 50% of the estate, respectively. Luise was stranded in Yugoslavia, where she had survived the War with two young children. Her husband was arrested by the communists and executed for being a "capitalist." ALTMANN's older brother Robert, who had fled to Vancouver, Canada with his two other brothers, took up the task of attempting to retrieve Ferdinand's property, which by law now belonged to his heirs.

36. Robert retained a lawyer in Vienna, Dr. Gustav Rinesch, a family friend who had also been retained by Ferdinand in the months before his death, to locate and retrieve property stolen from Ferdinand during the Nazi period.

37. ALTMANN's older brother Karl Bloch-Bauer, a captain in the allied armed forces, returned to Vienna and recovered one of the Klimt paintings, *Houses in Unterach am Attersee*, from Dr. Führer, who was imprisoned for Nazi activities. The painting was kept, along with other artworks

taken by Dr. Führer from Ferdinand's collection, in Karl's (or his lawyer's) apartment in Vienna pending a request for permission to export the works to Canada.

38. In December, 1947, the Museum of the City of Vienna offered to return the painting *Beechwood* to Ferdinand's heirs in exchange for a refund of the purchase price.

39. In January 1948, Dr. Rinesch wrote to the AUSTRIAN GALLERY informing it of the heirs' claim to the three paintings that had come into the museum's possession as a result of transactions conducted by Dr. Führer.

40. In February 1948, Dr. Karl Garzarolli of the AUSTRIAN GALLERY responded in writing to Dr. Rinesch, asserting (falsely) that six Klimt paintings were bequeathed to the museum by the will of Adele Bloch-Bauer, who died in 1925, and that Ferdinand had asked permission from the museum to keep the paintings during his lifetime. Dr. Garzarolli demanded that the heirs deliver the other paintings referenced in Adele's will to the museum. These false claims were repeated to Dr. Rinesch in February, 1948 by the former director of the AUSTRIAN GALLERY, Prof. Bruno Grimschitz, who had been removed from his position after the War. At the end of February, 1948, Dr. Rinesch wrote to Robert Bentley informing him of the AUSTRIAN GALLERY's position and its claims concerning the will of Adele Bloch-Bauer.

41. In March 1948, Dr. Garzarolli learned of the true contents of Adele's will and probate proceedings. He then

realized that the AUSTRIAN GALLERY's claims concerning the Klimt paintings were untenable. First, in the probate proceedings concerning Adele Bloch-Bauer's will, the attorney for the estate, Ferdinand's brother Gustav Bloch-Bauer, had declared that the Klimt paintings were not the property of Adele, but of her husband Ferdinand, and they were treated as such in the estate proceedings. Second, in her will Adele had expressed only the unenforceable wish that her husband consider leaving the paintings to the museum after his death. Third, although Gustav Bloch-Bauer in 1926, and Prof. Grimschitz in 1948, declared that Ferdinand, had promised to fulfill his wife's wishes, there was no notarized document signed by Ferdinand, making the alleged promise unenforceable against Ferdinand or his heirs.

42. Garzarolli realized the invalidity of his museum's claim to the Klimt paintings, as he very revealingly confided in a letter to his Nazi-era predecessor, Bruno Grimschitz, on March 8, 1948:

> Because there is no mention of these facts [the purported donation of the Klimt paintings by Adele or Ferdinand] in the available files of the AUSTRIAN GALLERY, i.e. neither a court-authorized nor a notarized or other personal declaration of Ferdinand Bloch-Bauer exists, which in my opinion you certainly should have obtained, I find myself in an extremely difficult situation. . . . I cannot understand why even during the Nazi era an incontestable declaration of gift in favor of the state was never obtained from Ferdinand Bloch-Bauer. . . .

> In any case, the situation is growing into a sea snake . . . I am very concerned that up until now all of the cases of restitution have brought with them immense confusion. In my opinion it would be also in your interest to stick by me while this is sorted out. Perhaps that way we will best come out of this not exactly danger-free situation.

The Extortion

43. Despite the heirs' diligent efforts to locate the records and the truth regarding their inheritance, Dr. Garzarolli did not disclose these facts to Dr. Rinesch or the heirs, and kept the files from Adele's probate proceedings in his possession. Instead, despite his private reservations, Dr. Garzarolli took an aggressive stance against the heirs and prepared to sue them to obtain the other Klimt paintings that were not yet in the AUSTRIAN GALLERY's possession.

44. On around March 30, 1948, officials from the AUSTRIAN GALLERY reviewed artworks in the apartment of Karl Bloch-Bauer (or his attorney) in order to advise the Federal Monument Agency whether to permit the artworks to be exported to Canada, where Karl and his brother, Robert Bentley, resided. The officials from the AUSTRIAN GALLERY recognized that several of the artworks in the apartment, including Klimt's *Houses in Unterach am Attersee,* were formerly part of the estate of Ferdinand Bloch-Bauer.

45. On April 1, 1948, Dr. Garzarolli of the AUSTRIAN GALLERY wrote to the Austrian Attorney General

(*Finanzprokuratur)* seeking legal assistance in obtaining the Klimt paintings which were not yet in the possession of the AUSTRIAN GALLERY, including the Klimt painting in Karl Bloch-Bauer's (or his lawyer's) apartment.

46. On April 2, 1948, Dr. Garzarolli wrote to Dr. Otto Demus, president of the Federal Monument Agency, notifying him that the AUSTRIAN GALLERY was interested in obtaining several of the artworks belonging to the heirs of Ferdinand Bloch-Bauer which were seen in Karl's apartment. Dr. Garzarolli requested that the processing of export permits for the heirs' artworks be delayed "for tactical reasons."

47. On April 3, 1948, Dr. Demus of the Federal Monument Agency telephoned and met with Dr. Rinesch and informed him that the AUSTRIAN GALLERY put great value in the artworks in Karl's apartment and that a quick agreement concerning export permits was unlikely. Dr. Demus discussed the subject of the Klimt paintings with Dr. Rinesch and informed him that if there was a dispute over these works, none of the artworks from Ferdinand's collection would be permitted to be exported to the heirs until that dispute was resolved.

48. This discussion also pertained to a large number of valuable artworks from Ferdinand's collection which had been stolen by the Nazis for the collections of Adolf Hitler and Hermann Göring, among others, and were being held in the Allied Art Collecting Point in Munich, Germany. These artworks could only be returned to the heirs after the allied forces had delivered them to Austrian authorities at the request of the Federal Monument Agency. These works would

also be subject to review by the AUSTRIAN GALLERY and the Federal Monument Agency, and export permits would only be granted with their consent. Given the high artistic and monetary value of these other works, Dr. Rinesch had every reason to expect that the AUSTRIAN GALLERY and the Federal Monument Agency would attempt to use the export permit restrictions to obtain "donations" of a number of these artworks.

49. On April 10, 1948, Dr. Rinesch met with Dr. Garzarolli to discuss the impending application for export permits for the entire collection of Ferdinand Bloch-Bauer, including the artworks in Karl's apartment and those sought from the Art Collecting Point in Munich. In the course of this meeting, Dr. Rinesch told Dr. Garzarolli that Ferdinand's heirs would acknowledge the will of Adele Bloch-Bauer and allow the AUSTRIAN GALLERY to keep the six Klimt paintings mentioned in that will. Dr. Rinesch made this agreement with the hope and expectation that Dr. Garzarolli would permit the heirs to export other artworks. Dr. Rinesch knew that Dr. Garzarolli's cooperation was absolutely necessary if he was to obtain export permits for any of the artworks from Ferdinand's collection.

50. Dr. Rinesch saw the probate files for Adele's will for the first time on April 10, 1948, the same day he met with Dr. Garzarolli and agreed that the heirs would "donate" the Klimt paintings. He apparently realized that Adele's will was not legally binding, but purportedly believed at the time that the evidence of Ferdinand's purported promise to fulfill his wife's wishes would be sufficient to give the museum a claim, as he reported to Robert Bentley on April 11, 1948.

51. Dr. Rinesch's April 11, 1948 report to Robert Bentley was mistaken and his legal conclusion concerning the enforceability of Ferdinand's purported promise was incorrect. In fact, Ferdinand's purported promise had no binding effect and was legally unenforceable. Dr. Rinesch most likely did not know at the time that Ferdinand's purported promise was never memorialized. In later documents, Dr. Rinesch alleged that the heirs had had the ability to prevent the Klimt paintings from going to the AUSTRIAN GALLERY, and successfully argued that their "donation" to the museum justified the granting of export permits for other artworks.

52. On April 12, 1948, Dr. Rinesch executed a document purporting to acknowledge on behalf of the heirs of Ferdinand Bloch-Bauer the intention expressed in Adele's will concerning the Klimt paintings. Dr. Rinesch possessed no valid legal authority to enter into this agreement, and the AUSTRIAN GALLERY, contrary to ordinary and customary practice, never requested proof of his authority, or confirmation in writing by the heirs, even though Dr. Rinesch asked that the agreement be confirmed with his client Robert Bentley.

53. On or about April 12, 1948, Dr. Rinesch allowed the AUSTRIAN GALLERY to pick up the Klimt painting *Houses in Unterach am Attersee* from Karl's apartment.

54. On April 13, 1948, Dr. Rinesch submitted to the Federal Monument Agency a lengthy application for export permits for the remainder of Ferdinand Bloch-Bauer's art collection. Dr. Rinesch sent a copy of the application to

Dr. Garzarolli asking for his support for the application, concluding in his cover letter, "I rely on your sense of justice."

55. Although not without difficulties caused by Dr. Garzarolli and Dr. Demus, over the next 18 months Dr. Rinesch obtained export permits for almost all of the other recovered artworks. Still fighting for export permits in July 1949, Dr. Rinesch wrote:

> The Bloch-Bauer heirs have, to document their interest in the public Austrian collections, in the most loyal way agreed that the major works of the Austrian painter Gustav Klimt from the Bloch-Bauer collection may remain at the AUSTRIAN GALLERY as a bequest. Even if this bequest was originally already foreseen in the will of Ferdinand Bloch-Bauer's deceased wife, the heirs certainly had the ability to prevent the fulfillment of this bequest, because in the meantime the financial circumstances of the testatrix's family had changed catastrophically and also the remaining conditions of the bequest had fallen away through the experiences of the Third Reich.

56. Dr. Rinesch enlisted the support of Dr. Garzarolli, who now agreed to approve lifting the export restriction on several remaining works, based on the purported donation of the Klimt paintings:

> The AUSTRIAN GALLERY has recently studied the question again and believes that for the following reasons approval of export can be

recommended for both paintings without exception. Namely, the heirs of Ferdinand Bloch-Bauer have immediately agreed to acknowledge and accept Ferdinand's declaration that in the event of his death he wished to follow the wishes of his deceased wife to donate the paintings by Gustav Klimt to the AUSTRIAN GALLERY, despite various transactions by Bloch-Bauer's attorney during the Nazi era that extremely worsened the situation of the AUSTRIAN GALLERY, and thereby established a way for the AUSTRIAN GALLERY actually to receive this bequest.

57. In the course of seeking export permits, the heirs were also required to donate one further work to the AUSTRIAN GALLERY, as well as 19 porcelain settings and 16 Klimt drawings to other federal museums. A watercolor and 15 porcelain settings had to be traded for comparable, but probably inferior, substitutes from the federal museum collections.

58. With the assistance of Dr. Rinesch, the AUSTRIAN GALLERY also obtained the Klimt painting *Beechwood* from the Städtische Sammlungen, and a notarized agreement from Gustav Ucicky to donate his Klimt paintings, including *Schloss Kammer am Attersee III*, to the AUSTRIAN GALLERY after his death, which occurred in 1961.

59. The government continued to fight the heirs in other ways, dragging out the negotiations over the return of Ferdinand's sugar factory for over ten years. The heirs and

their attorney finally gave in, settling for a payment of just $600,000 from the sale of the sugar factory. As part of the settlement, they were forced to give up the beautiful Elisabethstrasse home, which to this day houses the offices of the Austrian railroad. They also had to sell a number of the returned artworks to pay taxes the government said were due from the factory. Nothing was ever retrieved from Czechoslovakia. Almost all of the fabulous porcelain collection was never returned, and pieces continue to show up at auction – the owners purportedly immune from suit under Europe's "bona fide" purchaser rules, despite the fact that it is difficult to imagine how purchasers could have been unaware that these were snatched from their rightful owners.

60. From Ferdinand's once enormous personal estate, little or nothing remained. The post-war restitution process in Austria had turned the old maxim on its head – to the defeated went the spoils.

Lack of ALTMANN's Authorization, Knowledge or Consent

61. ALTMANN never authorized Dr. Rinesch to negotiate on her behalf or to allow the AUSTRIAN GALLERY to obtain the Klimt paintings. ALTMANN was not fully informed of these activities and proceedings until January 1999, when documents relating to the transfer of the Klimt paintings were released by the REPUBLIC OF AUSTRIA in connection with a review of the provenance of artworks obtained by the AUSTRIAN GALLERY in the post-war period. Until 1999, ALTMANN mistakenly believed that the artworks had been freely donated by her aunt Adele

and uncle Ferdinand to the AUSTRIAN GALLERY before the War. She was unaware that the paintings were stolen from her uncle and that it was only through the unauthorized agreement of Dr. Rinesch in April 1948, purportedly made on her behalf, that the AUSTRIAN GALLERY had claimed ownership of the paintings.

62. ALTMANN's mistaken belief was the result of the false statements made by the AUSTRIAN GALLERY to Dr. Rinesch, which were transmitted to ALTMANN's brother, Robert Bentley, in Vancouver, Canada, and later recounted to ALTMANN by her brother and other family members. Furthermore, in numerous exhibits and publications concerning the Klimt works, the AUSTRIAN GALLERY had provided incorrect provenance information and had repeated the false claim that the artworks were donated by Ferdinand and Adele Bloch-Bauer to the museum on dates inconsistent with the true facts.

63. For example, in the book *Gustav Klimt in the AUSTRIAN GALLERY Belvedere in Vienna* by Dr. Gerbert Frodl, the current director of the AUSTRIAN GALLERY, it is alleged that the two paintings *Adele Bloch-Bauer* and *Apple Tree I* were obtained by the museum through a bequest of the Bloch-Bauer family in 1936. The book also states that *Adele Bloch-Bauer II* was obtained from Ferdinand Bloch-Bauer in 1928. This provenance information is false, and is belied by numerous documents that are in the AUSTRIAN GALLERY's possession. The paintings were obtained in 1941-1943, during the liquidation of Ferdinand's estate by the Nazis.

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64. Until the recent investigation prompted by the enactment of a new Austrian law in December 1998, however, ALTMANN had no reason to question these statements and did not know, and could not have known, the truth until documents evidencing these facts were released by the AUSTRIAN GALLERY and the Federal Monument Agency in 1999.

65. ALTMANN's brother Robert and sister Luise, both of whom died before 1999, also were unaware of the truth regarding Ferdinand's Klimt paintings. ALTMANN is informed and believes, and based thereon alleges that the heirs did not properly authorize Dr. Rinesch's April 1948 agreement, and could not have learned of the truth before 1999. For his part, Dr. Rinesch probably believed that under the circumstances, and the duress imposed by the REPUBLIC OF AUSTRIA and the AUSTRIAN GALLERY, he was doing the best for Ferdinand's heirs. Indeed, Dr. Rinesch was relatively successful in securing the release of other artworks, largely as a result of his "donation" of the Klimt paintings. But this does not mitigate the fact that none of the heirs were fully informed of the underlying facts prior to his decision, and none of them properly authorized the "donation" of the Klimt paintings.

The Revelation

66. In early 1998, in the wake of the seizure of two paintings by Egon Schiele that had been loaned to the Museum of Modern Art in New York by a government-supported Austrian foundation, the Austrian federal minister

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for education and culture, Elisabeth Gehrer ("Gehrer"), opened up the old archives to permit researchers to prove that no looted artworks remained in Austria.

67. Thereafter, and much to her surprise, an Austrian author and journalist, Hubertus Czernin ("Czernin"), published a series of articles exposing the fact that Austria's federal museums had profited greatly from the extortion of artworks from exiled Jewish families after the War. Principal among these artworks were the collections of the Bloch-Bauer, Rothschild and Lederer families. Klimt's *Portrait of Adele Bloch-Bauer I*, which all the museum publications represented as having been donated to the museum in 1936, was revealed to have been transferred to the museum only in 1941 with a letter from the Nazi lawyer Führer signed "Heil Hitler." The revelations were devastating.

68. Gehrer responded by closing the Federal Monument Agency archives and ordering a thorough investigation by a committee of archivists from the various federal museums and headed by the director of the Federal Monument Agency, Ernst Bacher ("Bacher"). The researchers essentially confirmed Czernin's stories and reported to Gehrer that indeed many valuable artworks had not been restituted to their owners after the war and in many cases donations were coerced by government officials. In several instances, such as with the Klimt paintings from the Bloch-Bauer collection, the provenance had been falsified to hide the fact that the paintings had been stolen during the War.

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Promised Restitution

69. In response, in September 1998, Gehrer proposed a new restitution law, designed to return artworks that had been donated to federal museums under duress in exchange for export permits, or obtained by the federal museums despite having a provenance which suggested that they were never properly restituted to their pre-War owners. The law was unanimously approved by the Austrian parliament and signed into law by the President of Austria in December 1998. The new law created a committee made up of government officials and art historians which was to advise Gehrer which artworks should be returned and to whom. Dr. Rudolf Wran ("Wran"), the section chief for culture under Gehrer, was selected to head this committee.

70. In January, 1999, the government permitted Czernin to copy the documents in the Federal Monument Agency files. Czernin provided copies to ALTMANN's attorney, E. Randol Schoenberg ("Schoenberg"). It was at this time that ALTMANN first learned that the AUSTRIAN GALLERY had lied to her brother's attorney about the contents of Adele's will, and had swindled her out of her inheritance.

71. In early February, the committee announced its first recommendation to return hundreds of artworks to the Austrian branch of the Rothschild family. Later that month, Minister Gehrer responded to parliamentary inquiries regarding a long list of suspect artworks by concluding with respect to the Bloch-Bauer collection that "the connection between the donation of the Klimt paintings and the export

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permit law is evident." The Austrian press reported in big headlines that the Klimt paintings would have to be returned to Ferdinand's heirs.

The Opposition

72. But Wran and the other committee members had other plans. Most of them were greatly distressed by the prospect of returning these icons of Austrian art to Ferdinand's heirs. The Rothschild collection, while certainly very valuable, did not include any significant Austrian artworks. As valuable as it was, the entire Rothschild collection, which was auctioned off in July 1999 for $90 million, was probably worth only a little more than half as much in today's market as Ferdinand Bloch-Bauer's Klimt paintings that are at the core of the Klimt collection at the AUSTRIAN GALLERY, Vienna's most popular museum. Certainly in terms of their importance to Austria, Ferdinand's Klimt paintings are in a class by themselves.

73. Anticipating possible opposition from the very conservative committee, Schoenberg obtained an opinion from an Austrian expert on probate and estate law, Dr. Andreas Lintl, on the significance of Adele's will. Lintl concluded (as had Gustav Bloch-Bauer in 1948 and Garzarolli and Dr. Rinesch in 1948) that the statements in Adele's will were of no legal consequence and that the heirs had not been required to give the paintings to the AUSTRIAN GALLERY. This meant that the paintings were donated solely in exchange for export permits and would have to be returned under the new restitution law. Schoenberg sent the opinion to Wran.

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74. In March, Bacher's research committee submitted a report on the Bloch-Bauer collection to Wran's committee, and sent a copy to Schoenberg. The report omitted key documents, gave only a partial view of the story, and made several incorrect conclusions. For example, the report omitted the crucial portions of Dr. Garzarolli's March 8, 1948 letter to Dr. Grimschitz. Schoenberg wrote to Wran and Bacher correcting the report and asked that his letter and further documents be shown to Wran's committee. Unbeknownst to Schoenberg, this request was not honored and the rest of the committee was forced to rely on an incomplete and misleading report.

75. Schoenberg met with Wran in late April, but Wran could not discuss the specifics of the case. Wran forced the decision on the Bloch-Bauer collection to be pushed off by the committee until the end of June. In the meantime, he and one of his compatriots on the committee, Manfred Kremser, a government attorney, drafted a legal opinion contrary to the one submitted by the heirs. Not knowing the conclusions of the government attorney's opinion, Schoenberg requested by telephone and in writing that he be given an opportunity to read any contrary opinion and to address the committee and respond to any arguments made against restitution. This request was refused by Wran and Kremser. Having heard from the press that opposition was brewing, but in the dark as to what Kremser had written, Schoenberg submitted a further opinion from Lintl again concluding that neither Ferdinand, nor his heirs, were legally required to donate the paintings to the AUSTRIAN GALLERY.

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The Decision

76. On June 28, 1999, the committee met and quickly affirmed the recommendation of Wran and Kremser that the Klimt paintings not be returned. The committee did agree to return 16 Klimt drawings and 19 porcelain settings that had been donated by the family in 1948 as part of the consideration for export permits. Gehrer simultaneously announced her adoption of the committee's recommendations.

77. The other members of the committee were not given copies of the two opinions by Lintl, nor were they given most of Schoenberg's letters or informed of his request to see and respond to Kremser's opinion. Wran confirmed this when he informed Schoenberg of the committee's decision. The Bloch-Bauer heirs and their attorney had been purposely excluded from the entire decision-making process.

78. Not all of the committee members were in accord with Wran's tactics. Ilsebill Barta-Fliedl abstained from the vote and questioned the judgment and motives of the other members. Before the committee even discussed the matter she had been ordered by her superior, one of the government ministers, not to vote in favor of restitution in the Bloch-Bauer case. Apparently, the committee vote was predetermined by the Austrian government before the committee had even discussed the matter. The vote was a sham. At the end of the year, Barta-Fliedl resigned from the committee in protest. She has stated that it was clear from the first couple of meetings that the attitudes of the other members of the committee were inconsistent with the

purposes of the committee. The committee was made up of people who opposed art restitution in general and were especially hostile to the claims of Ferdinand's heirs.

The Law

79. Kremser's legal opinion, and therefore the committee's decision, was premised on the false assertion that Adele's will gave the AUSTRIAN GALLERY an ownership interest in the paintings. In coming to this conclusion, however, Kremser purposely misread Adele's will and expressly disagreed with all of the leading Austrian legal experts who have written on this precise legal issue in the last several years (before the Bloch-Bauer case arose). First, Adele's will merely expresses a request, but did not purport to obligate Ferdinand to make the donation. Second, even if Adele did purport to obligate Ferdinand, the obligation would not have been enforceable because the paintings belonged to Ferdinand.

80. In his 1994 article on "The Legacy of an Object Not Belonging to the Estate," Prof. Rudolf Welser, Director of the Institute for Civil Law at the University of Vienna, concluded:

> [The rule] that the testamentary disposition of an object not belonging to the estate is valid when the object belongs to an heir, does not apply in the case when the testator sets forth that the heir should upon his own death leave an object from his own separate property to a third party.

81. Adele's will reads as follows:

> I ask my husband after his death to leave my two portraits and the four landscapes of Gustav Klimt to the AUSTRIAN GALLERY.

82. In the estate files is a declaration dated January 1926 from Gustav Bloch-Bauer (Ferdinand's brother), the attorney for the estate, stating:

> It should be noted that the referenced Klimt paintings are not the property of the deceased testatrix, but of her husband.

83. The Klimt paintings were not included as part of Adele's estate during the course of the probate proceedings.

84. Thus, even if one were to conclude that Adele's request purported to obligate her husband, it is clear that her request was not a legal bequest, but was at most a "Legacy of an Object Not Belonging to the Estate" asking her husband Ferdinand to dispose of his own property in a certain way after his death. This wish, according to Prof. Welser and the other Austrian legal scholars, is, and was, unenforceable (as it would be under American law). To enforce such a request against the terms of Ferdinand's last will would violate and circumvent the strict laws regarding testamentary dispositions. And yet Kremser and Wran led the commission members to believe the exact opposite so that there would be no opposition to the government's pre-ordained decision not to return the paintings to Ferdinand's heirs.

Political Pressure

85. Schoenberg wrote to Gehrer to inform her of the committee's grave error and the denial of due process to Ferdinand's heirs. He recommended an arbitration process to resolve the dispute over the legal significance of Adele's will. Gehrer rejected this approach, stating that if the heirs believed the decision was wrong, their only remedy was to go to court. Gehrer also stated, contrary to all the facts that were available to her and in clear denial of what had transpired during the Nazi era, that "[t]he paintings were not stolen from Ferdinand Bloch-Bauer."

86. Clearly, even the one government minister who had proposed the new law, now found it politically impossible to continue. Her party, the conservative People's Party, faced difficult elections in October, 1999 where her party eventually came in third, behind even the far-right Freedom Party led by Jörg Haider, known for praising Nazi SS leaders as "men of character," and referring to Nazi death camps as "penal institutions." By rejecting the Bloch-Bauer's claims to the Klimt paintings, Gehrer joined in the Holocaust denial and revisionism that has reigned in certain circles in Austria since the end of the war. It is no surprise that she was rewarded for her "loyalty" and reappointed as a prominent minister in Austria's new right-wing coalition government.

Attempts To File An Austrian Lawsuit

87. In September, 1999, ALTMANN announced that she would file a lawsuit in Austria to vindicate her claim. However, the government had more in store for her. First, it

was necessary to apply for a waiver of the enormous court costs required to bring a lawsuit in Austria. These court costs are based on the value of the recovery that is sought and in this case would total several million dollars, far beyond what ALTMANN, who still works as a specialty dress supplier at age 84, can afford.

88. However, in November, 1999, the Austrian court granted ALTMANN and some of the other heirs only a partial waiver, and ruled that they were required to spend approximately $350,000 or all the assets at their disposal – essentially their entire life savings – in order to proceed. The Court ruled as follows:

> Given that the statutory rate for a claim valued at 2 billion shillings amounts to about 20 million, it is evident that the demonstrated income and assets of the plaintiffs do not permit them to bear all the expenses themselves. Of course, it is [also] evident from the findings that they must pay the amount set by the statute themselves to the extent they can be required to draw upon their assets. In particular, there is no reason to spare [the plaintiffs'] savings accounts at the expense of the general public [i.e., the Austrian State].

89. Not content with even this impossible ruling, in December, 1999 the Austrian government appealed the court's decision, arguing that the amount Mrs. Altmann and the other heirs should have to pay should include the value of the porcelain and drawings that were finally returned to them, after lengthy bureaucratic delays, in November, 1999.

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This appeal was rejected as moot because ALTMAN was unable to file the lawsuit in Austria.

The Treaty

90. In Article 26 of the Multilateral Austrian State Treaty of May 15, 1955, Austria promised:

> In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13th March, 1938, been subject to forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories.

91. Austria has failed to live up to its treaty obligations because it has refused to return the Klimt paintings to Ferdinand's heirs.

92. In his May 15, 1959 letter regarding the settlement of Article 26 claims for restitution, U.S. Ambassador to Austria H. Freeman Matthews concluded:

> My Government has instructed me to advise you that it may approach the Austrian Federal Government in the future in connection with the settlement of individual claims asserted under Article 26 of the State Treaty which are not presently known to my Government and do not

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> fall within the classes and categories of claims enumerated in paragraphs 1 and 2 of Section A of your note [which do not including artworks].

93. In other words, the U.S. reserved the right to assert unknown claims, such as the ones for the Bloch-Bauer's paintings. The fact that the Austrian government had misled the heirs and had falsified the provenance of the paintings was not revealed until last year, so these claims fall within the category of claims "not presently known" in 1959. Therefore, the United States has the ability to enforce ALTMANN's claims against the AUSTRIAN GALLERY.

94. In 1998, the U.S. Congress enacted and President Clinton signed the Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 18 (1998) which provides:

> TITLE II—WORKS OF ART SEC. 201. FINDINGS.
>
> Congress finds as follows:
>
> (1) Established pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art.
>
> (2) In the years since World War II, international sanctions against confiscation of works of art have been amplified through such

conventions as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which forbids the illegal export of art work and calls for its earliest possible restitution to its rightful owner.

(3) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.

(4) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

(5) Hence, the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust.

(6) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.

SEC. 202. SENSE OF THE CONGRESS REGARDING RESTITUTION OF PRIVATE PROPERTY, SUCH AS WORKS OF ART.

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Last Resort

95. As described above, Austria has failed to undertake good faith efforts to facilitate the return of the Klimt paintings that are the subject of this action, in the sense that would be required under the Holocaust Victims Redress Act.

96. ALTMANN alleges that she is essentially without any legal remedy in Austria for her claims. The new Austrian law purports to give victims no additional legal right to make claims for the return of artworks, although ALTMANN contends that under Austrian law she may enforce her right to an equal application of the law. However, in order to file an action in Austria challenging the decision of the minister, ALTMANN would be required to post an enormous cost bond equivalent to a percentage of the value of the paintings. ALTMANN requested a waiver of this bond requirement, which request was granted only in part, so that ALTMANN would be required to post a bond equal to all or most of her

assets other than her home before proceeding. ALTMANN cannot afford to proceed under these conditions in Austria. This court is the only reasonably available forum in which ALTMANN's claims can be heard and adjudicated.

97. Minister Gehrer has stated that she would follow a court's ruling on the enforceability of the request in Adele's will, and ALTMANN is informed and believes that the AUSTRIAN GALLERY will abide by the decision of an American court in this matter.

FIRST CAUSE OF ACTION
FOR DECLARATORY RELIEF
(28 U.S.C. 2201)

98. ALTMANN incorporates here by reference paragraphs 1 through 97.

99. A dispute has arisen between ALTMANN and the AUSTRIAN GALLERY concerning the Klimt paintings.

100. Pursuant to a law enacted by the REPUBLIC OF AUSTRIA in December 1998, all artworks which were objects of restitution after the War and which were donated to the AUSTRIAN GALLERY in connection with a request for export permits, or were never properly restituted and were subsequently obtained by the AUSTRIAN GALLERY, must be returned to their original owners or their heirs. However, the AUSTRIAN GALLERY has refused to return the Klimt paintings to ALTMANN and the other heirs of Ferdinand Bloch-Bauer. On June 28, 1999, the federal minister who governs the AUSTRIAN GALLERY, Elisabeth Gehrer,

decided against restitution of the Klimt paintings mentioned in Adele's will to Ferdinand's heirs. On July 12, 1999, Gehrer wrote to ALTMANN's attorney stating that if the heirs continued to believe that the artworks were stolen, they should take their dispute to court. Thus, the issues in this case are ripe for declaratory relief.

101. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that Adele Bloch-Bauer's will did not give the AUSTRIAN GALLERY an enforceable right to inherit or obtain title to the six Klimt paintings before or after Ferdinand's death.

102. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that Ferdinand Bloch-Bauer's purported oral promises and actions prior to 1938, including the donation of one painting in 1936, did not give the AUSTRIAN GALLERY an enforceable right to inherit or obtain title to the other five Klimt paintings before or after Ferdinand's death.

103. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that the six Klimt paintings mentioned in Adele's will were legally the sole property of Ferdinand, and not Adele, at the time of Adele's death.

104. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that any request in Adele's will or any purported intention by Ferdinand prior to 1938, with regard to a donation of the Klimt paintings to the AUSTRIAN GALLERY, is unenforceable because the implied condition underlying it — namely, the ability of the Bloch-Bauer family

to live in Austria — was unalterably changed by the events that transpired after March 1938.

105. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that six Klimt paintings — *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl* — were stolen from Ferdinand by the Nazis in violation of international law.

106. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that none of the actions taken by Dr. Führer and Ferdinand during the War (between March 1938 and May 1945), gave the AUSTRIAN GALLERY the right to inherit or obtain title to the six Klimt paintings taken from Ferdinand's collection during the War.

107. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that the six Klimt paintings stolen from Ferdinand by the Nazis were subject to restitution to Ferdinand after the end of the War in May, 1945.

108. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that the six Klimt paintings stolen from Ferdinand by the Nazis were subject to restitution to Ferdinand's heirs after Ferdinand's death in November, 1945.

109. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that five of the six Klimt paintings stolen from Ferdinand — with the sole exception of the portrait of *Amalie Zuckerkandl* — were the subject of restitution proceedings from 1945 through 1948.

110. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that all of the recovered artworks from the collection of Ferdinand Bloch-Bauer, including the Klimt paintings, were or would have been subject to export permit restrictions imposed by the Federal Monument Agency in conjunction with the AUSTRIAN GALLERY.

111. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that proceedings concerning export permits for all of the recoverable artworks from the collection of Ferdinand Bloch-Bauer, including the Klimt paintings, were initiated prior to the purported "donation" of the Klimt paintings by Dr. Rinesch to the AUSTRIAN GALLERY on April 10 or 12, 1948.

112. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that in the course of seeking export permits for other portions of the collection, five of the Klimt paintings were purportedly "donated" to the AUSTRIAN GALLERY by Dr. Rinesch.

113. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that ALTMANN never authorized any purported "donation" of Klimt paintings to the AUSTRIAN GALLERY.

114. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that ALTMANN was never obligated to transfer any of the Klimt painting to the AUSTRIAN GALLERY.

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115. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that any purported "donation" of Klimt paintings to the AUSTRIAN GALLERY was made without proper authorization from ALTMANN.

116. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that any purported "donation" of Klimt paintings to the AUSTRIAN GALLERY was made under economic duress, and the threat by the Federal Monument Agency and the AUSTRIAN GALLERY of withholding export permits from the heirs.

117. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that any purported "donation" by Dr. Rinesch of Klimt paintings to the AUSTRIAN GALLERY was made under the mistaken belief that the AUSTRIAN GALLERY had a valid legal claim to the Klimt paintings.

118. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that the AUSTRIAN GALLERY was responsible for the mistaken belief which resulted in the purported "donation" of the Klimt paintings by Dr. Rinesch to the AUSTRIAN GALLERY by withholding records and misstating facts.

119. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that ALTMANN is entitled to rescission of the purported "donation" by Rinesch of the Klimt paintings to the AUSTRIAN GALLERY.

120. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that the Klimt painting of *Amalie*

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Zuckerkandl was donated to the AUSTRIAN GALLERY by Vita Künstler in 1988, and is subject to restitution to the heirs of Ferdinand Bloch-Bauer.

121. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that under the new law enacted by Austria, ALTMANN is entitled to recover the following six Klimt paintings in the AUSTRIAN GALLERY: *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl.*

122. Wherefore ALTMANN prays for a declaration affirming ALTMANN's view of the aforementioned factual and legal issues. Resolution of these issues will allow ALTMANN to obtain restitution of the artworks from the AUSTRIAN GALLERY. Minister Gehrer has stated and has been quoted in the *New York Times* as saying that she will follow a court decision on the factual and legal issues involved in this matter. Furthermore, Minister Gehrer has written to ALTMANN's attorney that the heirs should seek relief in court if they feel aggrieved by her decision. Additionally, the United States has the ability under its treaty with Austria to enforce the judgment of this court declaring that ALTMANN in entitled to restitution of the Klimt paintings.

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SECOND CAUSE OF ACTION
FOR REPLEVIN

123. ALTMANN incorporates here by reference paragraphs 1 through 97.

124. After Ferdinand's death in November, 1945, ALTMANN was entitled to recover possession of the six Klimt painting: *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl.*

125. The AUSTRIAN GALLERY unlawfully withheld possession from ALTMANN of the three Klimt paintings taken during the War.

126. The AUSTRIAN GALLERY unlawfully obtained possession of two paintings based on false claims of ownership and duress.

127. The AUSTRIAN GALLERY obtained ownership of one further painting, *Amalie Zuckerkandl*, in 1988, and thereafter made false claims of provenance for the painting which hid the true fact that it was stolen from Ferdinand Bloch-Bauer and rightfully belonged to ALTMANN and his other heirs.

128. ALTMANN and the other heirs made reasonable efforts to reclaim their inheritance, but despite such efforts, ALTMANN did not learn, and could not reasonably have learned, of the facts revealing the false ownership claims until 1999.

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129. ALTMANN has been damaged by the deprivation of her property, and is entitled to either a recovery of the property or payment of her interest in the paintings, which interest is valued at approximately $150 million and will be subject to proof at trial.

THIRD CAUSE OF ACTION
FOR RESCISSION

130. ALTMANN incorporates here by reference paragraphs 1 through 97.

131. The AUSTRIAN GALLERY claims that ALTMANN, or the attorney purporting to represent her, Dr. Rinesch, agreed in April 1948 to acknowledge the request in Adele's will and effectively "donated" five of the six Klimt paintings referenced in Adele's will to the AUSTRIAN GALLERY.

132. ALTMANN alleges that any purported "donation" of the Klimt paintings to the AUSTRIAN GALLERY was made by mistake, or under duress, or without authority from ALTMANN.

133. At the time of the purported "donation," Dr. Rinesch and Ferdinand's heirs were under the mistaken belief that Adele and Ferdinand had legally donated the Klimt paintings to the AUSTRIAN GALLERY. The AUSTRIAN GALLERY was responsible for this mistaken belief, knew that Ferdinand's heirs and Dr. Rinesch held the mistaken belief, and knew that it was false at the time of the purported donation in April 1948.

134. At the time of the purported "donation," ALTMANN was under severe economic duress, having been deprived of all her property taken by the Nazis, as well as her inheritance. The AUSTRIAN GALLERY was responsible for this duress because it purposely withheld property from the heirs and conspired with the Federal Monument Agency to delay the granting of export permits for artworks belonging to the heirs.

135. At the time of the purported "donation," Dr. Rinesch was not authorized to act on ALTMANN's behalf.

136. As a result, ALTMANN is entitled to rescind the purported "donation" and recover the donated artworks from the AUSTRIAN GALLERY.

FOURTH CAUSE OF ACTION
FOR DAMAGES FOR EXPROPRIATION
AND CONVERSION

137. ALTMANN incorporates here by reference paragraphs 1 through 97.

138. After Ferdinand's death in November, 1945, ALTMANN was entitled to recover possession of the six Klimt paintings: *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl.*

139. The AUSTRIAN GALLERY unlawfully withheld possession from ALTMANN of the three Klimt paintings taken during the War.

140. The AUSTRIAN GALLERY unlawfully obtained possession of two paintings based on deceitful and false claims of ownership and duress, and through an unauthorized "donation" obtained from Dr. Rinesch as a result of those deceitful and false claims and duress.

141. The AUSTRIAN GALLERY obtained ownership of one further painting, *Amalie Zuckerkandl*, in 1988, and thereafter made false claims of provenance for the painting which hid the true fact that it was stolen from Ferdinand Bloch-Bauer and rightfully belonged to ALTMANN and his other heirs.

142. ALTMANN did not learn, and could not reasonably have learned, of the facts revealing the false ownership claims until 1999.

143. ALTMANN has been damaged by the conversion of her property, and is entitled to either a recovery of the property, or payment of her interest in the paintings, which interest is valued at approximately $150 million and will be subject to proof at trial.

FIFTH CAUSE OF ACTION
FOR DAMAGES FOR VIOLATION OF
INTERNATIONAL LAW

144. ALTMANN incorporates here by reference paragraphs 1 through 97.

145. The AUSTRIAN GALLERY violated international law by knowingly participating in and profiting from the Nazi

persecution of Ferdinand Bloch in the following ways: (1) the AUSTRIAN GALLERY assisted in the systematic looting of the property of Ferdinand Bloch-Bauer; (2) the AUSTRIAN GALLERY obtained artworks belonging to Ferdinand Bloch-Bauer during the War; (3) the AUSTRIAN GALLERY refused to return artworks to Ferdinand Bloch-Bauer and his heirs after the War; (4) the AUSTRIAN GALLERY used duress and deceit to obtain artworks that should have been restituted to Ferdinand's heirs during the post-war period, and (5) the AUSTRIAN GALLERY concealed its misdeeds from the heirs until they were exposed in 1998-99.

146. As determined by the United States Congress in Title II of the Holocaust Victims Redress Act of 1998, the above referenced actions by the AUSTRIAN GALLERY were in violation of numerous international treaties, customary international laws, and fundamental human rights laws prohibiting war crimes, including, or as reflected by the United Nations Charter, the Universal Declaration of Human Rights, the Geneva Convention of 1929, the supplemental Geneva Convention of the Treatment of Non-Combatants During World War Time, the Nuremberg Principles, the Covenant on Civil and Political Rights, and the Hague Convention of 1907.

147. As a result of the above referenced violations of international law, ALTMANN has suffered injury and is entitled to judgment, against the AUSTRIAN GALLERY on this cause of action for compensatory damages in an amount to be determined by the Court.

SIXTH CAUSE OF ACTION
FOR IMPOSITION OF A CONSTRUCTIVE TRUST

148. ALTMANN incorporates here by reference paragraphs 1 through 97.

149. The AUSTRIAN GALLERY obtained the Klimt paintings from Ferdinand Bloch-Bauer and his heirs through violations of international law, duress and deceit.

150. The AUSTRIAN GALLERY has wrongfully detained the Klimt paintings from ALTMANN now that the facts have come to light.

151. As a result, ALTMANN is entitled to the imposition of a constructive trust on the Klimt paintings, obligating the AUSTRIAN GALLERY to return the Klimt paintings to ALTMANN, or to compensate her fairly for their loss.

SEVENTH CAUSE OF ACTION
FOR RESTITUTION BASED ON
UNJUST ENRICHMENT

152. ALTMANN incorporates here by reference paragraphs 1 through 97.

153. As described above, the AUSTRIAN GALLERY has been unjustly and unlawfully enriched at the expense of Ferdinand Bloch-Bauer and his heirs. The AUSTRIAN GALLERY obtained the Klimt paintings from Ferdinand Bloch-Bauer and his heirs through violations of international law, duress and deceit, and has wrongfully withheld the paintings from ALTMANN.

154. As a result of the AUSTRIAN GALLERY's unjust enrichment, ALTMANN is entitled to restitution of the Klimt paintings to her, or the reasonable value thereof.

EIGHTH CAUSE OF ACTION FOR DISGORGEMENT OF PROFITS PURSUANT TO CAL. BUSINESS & PROFESSIONS CODE § 17200 ET SEQ.

155. ALTMANN incorporates here by reference paragraphs 1 through 97.

156. The AUSTRIAN GALLERY has engaged in unlawful and unfair business practices by displaying the looted Klimt paintings in its museum.

157. For almost 60 years, the AUSTRIAN GALLERY has unjustly and unfairly profited from the display of the looted Klimt paintings by obtaining entrance fees and selling concessions and memorabilia to museum visitors, including ones form California, who would not have otherwise visited the museum or made such purchases were it not for the presence of the Klimt paintings in the museum. One of the Klimt paintings, *Adele I*, appears on the cover of the AUSTRIAN GALLERY's official guidebook to the museum. Thousands of visitors each year come to the museum for the sole reason of viewing the looted Klimt paintings that were taken from Ferdinand Bloch-Bauer and unlawfully and improperly detained from his heirs.

158. As a result, the Court should require an accounting of the ill-gotten gains of the AUSTRIAN GALLERY, and

order that those illicit profits be disgorged and paid to ALTMANN, who could have earned those profits were it not for the unfair practices of the AUSTRIAN GALLERY.

PRAYER

WHEREFORE, MARIA V. ALTMANN prays relief as follows:

1. For a declaration that ALTMANN's contentions of fact and law set forth in the First Cause of Action are correct.

2. For an order directing the AUSTRIAN GALLERY to return the six Klimt paintings — *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl* — to ALTMANN and the heirs of Ferdinand Bloch-Bauer, or to compensate them for the current value of those artworks.

3. For an order rescinding the purported "donation" of five of Ferdinand's Klimt paintings to the AUSTRIAN GALLERY and directing the AUSTRIAN GALLERY to return the artworks to ALTMANN and the heirs of Ferdinand Bloch-Bauer, or compensate them for their share of the current value of those artworks.

4. For an award of damages in the amount of ALTMANN's interest in the artworks converted by the AUSTRIAN GALLERY, in an amount to be proven at trial, but estimated at $150 million.

5. For further compensatory damages for the AUSTRIAN GALLERY's violations of international law.

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6. For an accounting of the ill gotten gains of the AUSTRIAN GALLERY, and an order that those illicit profits be disgorged and paid to ALTMANN.

7. For pre- and post-judgment interest on any award.

8. For such other and further relief that the Court deems just and appropriate.

DATED: August __, 2000

Law Offices of E. Randol Schoenberg

By: _____
E. Randol Schoenberg
Attorney for Plaintiff
MARIA V. ALTMANN

APPENDIX I — DECLARATION OF DR. WALTER FRIEDRICH DATED FEBRUARY 1, 2001

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No.: 00-08913 FMC (AIJx)
[The Honorable Florence-Marie Cooper]

MARIA V. ALTMANN, an individual

Plaintiff,

v.

REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY, an agency of the REPUBLIC OF AUSTRIA,

Defendants.

Appendix I

Declaration of Dr. Walter Friedrich in Support of Defendants' Motion to Dismiss Under Rule F.R.Civ.P. 12(b)

[Filed concurrently with Defendants' Motion to Dismiss Under Fed.R.Civ.P. 12(b); Memorandum of Points and Authorities in Support Thereof]

DATE: March 19, 2001
TIME: 10:00 a.m.
CTRM: 750, Roybal Federal Building
255 E. Temple Street
Los Angeles, CA 90012

Complaint Filed: August 22, 2000

I, DR. WALTER FRIEDRICH declare as follows:

I. INTRODUCTION

A. *Qualifications*

1. I am a member of the Austrian Bar. I obtained my doctorate in law from the University of Vienna in 1975. I am a former judge of an Austrian regional court and was specially assigned to the Austrian Supreme Court for more than ten years. I am currently in private practice. My resume is annexed hereto as Exhibit 1.

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B. *Assignment*

2. I make this Declaration at the request of the attorneys for defendants the Republic of Austria, a foreign state, and the Austrian Gallery, which is officially called Österreichische Galerie Belvedere ("Defendants") in support of Defendants' Motion to Dismiss the Complaint of plaintiff Maria V. Altmann ("Plaintiff"). In particular, I have been asked to describe (1) the legal framework that was created in post-World War II Austria by the Allies and the Republic of Austria for the restitution of property taken from Jews and other persecuted groups by Nazi Germany during its occupation of Austria; (2) some aspects of the Austrian court system, that is to say regarding the independence of the judicial branch from the executive branch of the Austrian government and questions of enforceability of foreign judgments and (3) the procedure employed by Austrian courts today in determining the appropriate amount of court fees to be paid by claimants in civil matters and, more specifically, how that procedure was applied to Plaintiff's petition for legal aid before the Provincial Court for Civil Law Matters in Vienna. I make this Declaration based upon my own personal knowledge and research.

C. *Summary of Findings*

3. In carrying out the assignment discussed above, I have concluded that (1) since the liberation of Austria by the Allied Forces in 1945, it has been anticipated by the United States and Austria, and it continues to be the expectation of those sovereign states today, that Austria retains sole responsibility for adjudicating restitution claims

relating to property allegedly expropriated in Austria during its Nazi occupation ; and (2) Plaintiff has an available forum for her claims in Austria and the amount of court fees imposed on Plaintiff pursuant to her petition for legal aid before the Austrian court was significantly less than the fees that ordinarily would be imposed according to the standard formula under the applicable Austrian statute.

II. THE LEGISLATIVE AND DIPLOMATIC FRAMEWORK ESTABLISHED BETWEEN AUSTRIA AND THE UNITED STATES FOLLOWING WORLD WAR II PROVIDES FOR AUSTRIAN RESPONSIBILITY FOR ADJUDICATION OF RESTITUTION CLAIMS FOR PROPERTY ALLEGEDLY EXPROPRIATED DURING THE NAZI OCCUPATION

A. *1918 to 1938: The Inter-War Period*

4. Until the end of World War I, Austria, or, more specifically, the Austro-Hungarian Empire, was a major European power. By the Peace Treaty of St. Germain of 1919, Austria was reduced to a size of 83,000 square kilometres with only 6 million inhabitants. Post-war Austria made the transition from a monarchy to a republican constitutional system — the last Habsburg Emperor abdicated, and nobility and its privileges were abolished by 1919. Austria remained an independent democratic republic from the end of 1918 until its invasion and occupation by Nazi Germany in 1938.

B. *1938 to 1945: The Nazi Period*

5. On March 13, 1938, five years after their rise to power in Germany, the Nazis invaded Austria by force in the so-called "Anschluss," Austria was claimed to be the "Ostmark" region of Germany, and Austria ceased to be free and independent and became an occupied nation. The General Civil Code of Austria (ABGB), a codification of Austrian family, property, inheritance and obligations law dating back to 1811, remained in effect during the period of occupation. However, Nazi Germany enacted a multitude of anti-Jewish laws and regulations, including laws that mandated the registration of Jewish assets, that prohibited the purchase or unrestricted sale of artwork by Jews, and that provided for the escheat of Jewish assets to the German Reich upon the demise of the Jewish owners.

C. *1945 to 1955: The Post-War Period*

6. In April, 1945, with Austria's liberation by the Allies, a democratic Austria was reborn. The Austrian Proclamation of Independence was issued, a provisional, democratic Austrian Government was created, and the provisional government declared its chief goals of rebuilding Austria, eliminating all vestiges of the Third Reich's Nazi policies, and obtaining the trust and confidence of the Allies. See Neuhold et al., Österreichisches Handbuch des Völkerrechts (Austrian Handbook of Public International Law) 502 ¶ 2718 (1997).

7. On May 8, 1945, Nazi Germany surrendered and World War II ended in Europe. The provisional Austrian

Government immediately set about to enact legislation providing for the restitution of property seized in Austria pursuant to Nazi aryanization and other discriminatory laws. The United States occupation forces and the World Jewish Congress supervised the drafting of the Austrian restitution legislation, and anticipated that the Republic of Austria would control the restitution process.

8. On May 10, 1945, less than two weeks after issuing its Proclamation of Independence, the Austrian Government enacted the Law Regarding the Registration of Aryanized Property and Other Property Taken in Connection with the National Socialist Takeover of Power (Gesetz 10.5.1945 StGBl 10 über die Erfassung arisierter und anderer im Zusammenhang mit der nationalsozialistischen Machtübernahme entzogenen Vermögenschaften). That legislation, together with the ordinance implementing it, mandated the registration of all property and property rights that were taken after March 13, 1938, from their owners in connection with the Nazi assumption of power. Under penalty of imprisonment, the current holders of the property were required to report it to the designated Austrian authorities. The dispossessed owners were at liberty to file similar reports. On May 15, 1946, the Austrian National Assembly enacted the Federal Act Concerning the Declaration as Null and Void of Contracts and Other Legal Transactions That Took Place During the German Occupation of Austria (Bundesgesetz vom 15.5.1946 BGBl 106 über die Nichtigerklärung von Rechtsgeschäften und sonstigen Rechtshandlungen, die während der deutschen Besetzung Österreichs erfolgt sind).

9. Further restitution legislation included: (a) the First Restitution Act of July 26, 1946 (Bundesgesetz vom 26. Juli 1946 BGBl 156 über die Rückstellung entzogener

Vermögen, die sich in Verwaltung des Bundes oder der Bundesländer befinden (Erstes Rückstellungsgesetz)), which provided for the return of assets that were confiscated by the Third Reich and that were under administration by offices of the Republic of Austria or the federal Austrian states; (b) the Second Restitution Act of February 6, 1947 (Bundesgesetz vom 6. Februar 1947 BGBl 53 über die Rückstellung entzogener Vermögen, die sich im Eigentum der Republik Österreich befinden (Zweites Rückstellungsgesetz)), which provided for the return of assets that had become the property of the Republic of Austria by forfeiture; and (c) the Third Restitution Act of February 6, 1947 (Bundesgesetz vom 6. Februar 1947 BGBl 54 über die Nichtigkeit von Vermögensentziehungen (Drittes Rückstellungsgesetz)), which declared null and void acts of dispossession in connection with the Nazis' assumption of power and provided for the return of such dispossessed property to the original owner. Section 15 of the Third Restitution Act specifically provided that Austrian Restitution Commissions would have exclusive jurisdiction to decide any claims under the Act.

10. Between May 1947 and July 1949, the Austrian government enacted four additional restitution laws addressing: (a) restitution of firm names that had been changed or extinguished under Nazi duress (Fourth Restitution Act of May 21, 1947) (Bundesgesetz vom 21. Mai 1947 BGBl 143 betreffend die unter nationalsozialistischem Zwang geänderten oder gelöschten Firmennamen (Viertes Rückstellungsgesetz)); (b) restitution of assets taken from juridical persons that had lost their existence under Nazi duress (Fifth Restitution Act of June 22, 1949) (Bundesgesetz vom 22. Juni 1949 BGBl 164 über die Rückstellung entzogenen Vermögens juristischer

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Personen des Wirtschaftslebens, die ihre Rechtspersönlichkeit unter nationalsozialistischem Zwang verloren haben (Fünftes Rückstellungsgesetz)); (c) restitution of trademarks, copyrights and patents (Sixth Restitution Act of June 30, 1949) (Bundesgesetz vom 30. Juni 1949 BGBl 199 über die Rückstellung gewerblicher Schutzrechte (Sechstes Rückstellungsgesetz)); and (d) restitution of claims arising out of private employment contracts (Seventh Restitution Act of July 14, 1949) (Bundesgesetz vom 14. Juli 1949 BGBl 207 über die Geltendmachung entzogener oder nicht erfüllter Ansprüche aus Dienstverhältnissen in der Privatwirtschaft (Siebentes Rückstellungsgesetz)).

D. *The Austrian State Treaty of 1955*

11. On May 15, 1955, the United States, the USSR, Great Britain, France and Austria executed the Austrian State Treaty. The Preamble of the Treaty recognized that "on 13th March, 1938, Hitlerite Germany annexed Austria by force and incorporated its territory in the German Reich" and that "in the Moscow Declaration published on 1st November, 1943, the Governments of the Union of Soviet Socialist Republics, the United Kingdom and the United States of America declared that they regarded the annexation of Austria by Germany on 13th March, 1938, as null and void and affirmed their wish to see Austria re-established as a free and independent State." Since Austria was not regarded as a defeated Axis ally, but rather as a liberated country, the treaty was expressly considered a "State treaty," as opposed to a "peace treaty" of the type entered between the United States and Germany or the other Axis Powers. A true and correct copy of the State Treaty is attached hereto as Exhibit 2.

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12. In Article 1, the State Treaty re-established Austria "as a sovereign, independent and democratic State." Article 21 provided that "[n]o reparation shall be exacted from Austria arising out of the existence of a state of war in Europe after 1st September, 1939." Article 26 governing property, rights, and interests of minority groups in Austria, provided that:

> 1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13th March, 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories. Where return or restoration is impossible, compensation shall be granted for losses incurred by reason of such measures to the same extent as is, or may be, given to Austrian nationals generally in respect of war damage.
>
> 2. Austria agrees to take under its control all property, legal rights and interests in Austria of persons, organizations or communities which, individually or as members of groups, were the object of racial, religious or other Nazi measures of persecution where, in the case of persons, such property, rights and interests remain heirless or unclaimed for six months after the coming into force of the present Treaty, or where in the case of organizations and communities such organizations

or communities have ceased to exist. Austria shall transfer such property, rights and interests to appropriate agencies or organizations to be designated by the Four Heads of Mission in Vienna by agreement with the Austrian Government to be used for the relief and rehabilitation of victims of persecution by the Axis Powers, it being understood that these provisions do not require Austria to make payments in foreign exchange or other transfers to foreign countries which would constitute a burden on the Austrian economy. Such transfer shall be effected within eighteen months from the coming into force of the present Treaty and shall include property, rights and interests required to be restored under paragraph 1 of this Article.

13. The 1955 State Treaty was actively negotiated for nearly 10 years with continued revision and comment from the United States occupation forces and the World Jewish Congress. It is generally accepted that Austria fulfilled its obligations under Article 26(1) by the enactment of, inter alia, the various restitution laws described above. See Adamovich, Handbuch des österreichischen Verfassungsrechts (Handbook of Austrian Constitutional Law) 42 (1971).

14. By virtue of its ratification of the Treaty, the United States recognized Austria's responsibility and authority to return property falling within Article 26(1) and to arrange for the disposition of unclaimed property. It is my opinion that any issue relating to ownership or possession of such property may only be resolved by the Austrian authorities, whereas the other parties to the Treaty could advance or support such issues only on a state-to-state level.

15. In 1959, the United States and Austria entered into an agreement, memorialized in an exchange of diplomatic notes, that clarified the application of Austria's obligations under Article 26. U.S.-Austria Exchange of Notes Constituting an Agreement Concerning the Settlement of Certain Claims Under Article 26 of Austrian State Treaty, May 8-22, 1959, 10 U.S.T. 1158, 347 U.N.T.S. 3 (the "1959 Agreement"). The United States states in Section B(a) of the 1959 Agreement that:

> . . . after establishment of the Fund provided for under Point I with by-laws as set forth in the attached draft, and after the coming into force of the legislative measures designated above under Point II - in so far as satisfactory settlements are not reached - and under Points III and V, [the United States] will neither advance nor support through diplomatic channels against the Austrian Federal Government, any further claims of persecutees based on Article 26 of the State Treaty originating from the seizure, sequestration, confiscation, control or forced transfer of properties, legal rights and interests in Austria during the time after March 13, 1938 which come within the classes and categories enumerated in paragraphs 1 and 2 of Section A of this note [which, to the best knowledge of the United States, comprised all outstanding categories of claims for the restitution or restoration of properties, legal rights and interests of persecutees in Austria which were seized, confiscated, sequestrated, taken

under control or forcibly transferred during the time after March 13, 1938].

The 1959 Agreement constitutes a waiver by the United States of its rights under Article 26 to support private claims by diplomatic means and supports my conclusion that the parties to the State Treaty understood that document to provide the exclusive means of resolving claims subject to Article 26. A true and correct copy of the 1959 Agreement is attached hereto as Exhibit 3.

16. The United States government has expressly acknowledged the exclusive jurisdiction of the appropriate Austrian authorities in correspondence with potential claimants. *See* letter dated January 1950 from Francis E. Flaherty for the United States Secretary of State to a claimant, a true and correct copy of which is attached hereto as Exhibit 4 (stating that "a claim should be filed directly with the designated authorities in accordance with the provisions of the laws" and that "[t]hese laws apply to property regardless of the nationality of the property owners"); letter dated March 1950 from Francis E. Flaherty for the United States Secretary of State to a claimant, a true and correct copy of which is attached hereto as Exhibit 5 (stating that "[t]he restitution of property in Austria comes wholly within the purview of the Austrian Restitution courts").

E. *Further Austrian Restitution and Compensation Laws*

17. Austria's implementation of further restitution and compensation laws has been ongoing and continuous. Only the most significant of those laws are mentioned here:

18. On March 13, 1957, pursuant to Article 26 of the State Treaty, Austria enacted the Reception Organizations Act BGBl 73, as amended, which established two legal bodies known as Assembly Centers (Sammelstellen A und B). The Act assigned all stale restitution claims to the Assembly Centers, whose task it was to collect and realize assets taken during the Nazi period which had not been claimed after the war in accordance with the provisions of the Restitution Acts. The managers enacted provisions for distribution of the funds collected, which included compensation to Jewish individuals persecuted by the Nazis. The remaining 28% of the funds of Assembly Center A went to Israel, the United States, and Jewish communities in Austria for collective purposes.

19. On January 18, 1956, Austria established a compensation program, the "Aid Fund" for Political Persecutees Who Have Their Domicile and Permanent Residence Abroad (Fonds zur Hilfeleistung an politisch Verfolgte, die ihren Wohnsitz und ständigen Aufenthalt im Ausland haben, "Hilfsfonds") (BGBl 25). The Aid Fund distributed money received from the Austrian Government, upon application, to Nazi victims from Austria who had emigrated and lived abroad. Applications under the Aid Fund Act were solicited through numerous advertising campaigns abroad. By July 1961, the Austrian government had paid out the entire 550 million Austrian Schilling originally allocated to the fund. Beginning in 1962, the fund was restocked with another 600 million Austrian Schilling, for a total which would be equivalent to $300 million in today's dollars. By amendment dated December 13, 1976, the Austrian Government furnished another 440 million Austrian Schilling to be distributed to victims of Nazi persecution (BGBl 714).

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20. The Victims Welfare Law (OFG), which was passed in 1945 and re-enacted in 1947, has been amended more than 60 times and remains in force. That legislation provided life-long benefits to many classes of persons who were citizens or residents of Austria at the time of the Nazi occupation, including persons who resisted the Nazis by fighting for a free and democratic Austria, and persons who suffered "considerable losses" due to political reasons or reasons of origin, religion or nationality, as a result of unjust actions by courts, police or other authorities, or by action of the National Socialist German Workers Party. The legislation also allowed for claims by family members and relatives of victims who died under Nazi persecution.

21. The Act on Property Damage Caused by War and Persecution (KVSG, BGBl 1958/127) provided compensation to persons who lost or suffered damage to household property or property necessary to carry out a job within Austria as a result of the war or as a result of persecution by the Nazis.

22. The Federal Law of 26th October 1960 (BGBl 1960/222) provides for a one-time payment of 30 million Austrian Schilling and permanent annual allowances, beginning retroactively in 1958, to Austrian Jewish communities.

23. The First and the Second Artistic and Cultural Assets Settlement Act of 27 June 1969 and of 13 December 1985 concern the settlement of ownership of unclaimed works of art and cultural objects in the custody of the Federal Monument Office. Potential claimants were invited to file

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their claims and, in case they were denied, had the opportunity to initiate a court proceeding. In October 1996, approximately 8,000 remaining items, of which the original owners or their legal heirs could not be located, were auctioned off by Sotheby's ("Mauerbach Auction"). The proceeds of 155 million Schilling were transferred to the Jewish Community in Austria.

24. The Honorary Gifts Law (BGBl 1988/197), passed on the 50th anniversary of the occupation, provided for honorary gifts and payments to resistance fighters and victims of Nazi persecution in Austria.

25. In 1995, in connection with the 50th anniversary of the end of World War II, Austria enacted the Republic of Austria's National Fund Law (BGBl 1995/432), which provided benefits to persons who were persecuted by the Nazi regime on political grounds, on grounds of origin, religion, nationality or sexual orientation, on the basis of a physical or mental handicap, or on the basis of the accusation of so-called (by the Nazis) "asociality," or who in other ways became victims of Nazi wrongdoing or left the country to avoid such persecution. As of April 28, 1997, the fund had paid basic compensation amounts to each of 12,610 claimants, most of them living in the United States, Israel, Austria, and Great Britain.

26. On December 4, 1998, Austria enacted the Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections, authorizing the Minister of Finance to return artworks in special instances enumerated in the Statute, where claims could otherwise not

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be made. It was pursuant to this legislation that an advisory board was established to advise the Austrian government as to the disposition of particular artworks, including the Klimt paintings at issue in this litigation. A true and correct copy of the 1998 Statute, together with a certified English translation, is attached hereto as Exhibit 6. It must be noted that section 2(2) of the Statute expressly states that it does not grant the claimants any enforceable rights. The Austrian Supreme Court (OGH), however, ruling on such a clause in a statute dealing with subsidies to be granted to Austrian businesses by the Austrian Chamber of Commerce, has held that the denial of the subsidy is nevertheless subject to judicial review under a doctrine which scholars call "effect of constitutional rights on third parties," those rights being so fundamental under the Austrian Constitution that even a statutory clause like the one mentioned above cannot dispense with them (*see* OGH 26th Jan. 1995, 6 Ob 514/95). Therefore, if the Minister's ruling was discriminatory, it could be challenged in the Austrian courts by Plaintiff, arguing that the above-mentioned OGH decision is controlling. Indeed this view was relied on heavily in Plaintiff's Austrian complaint drafted by her Austrian attorney Dr Gulner, a true and correct copy of which, together with a certified English translation, is attached hereto as Exhibit 7.

27. During the past two years, negotiations on matters of restitution have continued between Austria and many other countries, including the United States. As recently as October 24, 2000, an agreement addressing compensation for persons who performed forced labor in Austrian territory during the Nazi occupation was signed by the United States and Austria. It establishes the Austrian Fund for Reconciliation, Peace

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and Cooperation, which covers those claims, and the signatory parties agreed that it would be in their interest for the Fund to be the exclusive remedy and forum for the resolution of all those claims. The Austrian law implementing this agreement has been in force since November 27, 2000.

28. Most recently, negotiations between the United States and Austria reached a climax on 17th January 2001 with the signing of a Joint Statement. A true and correct copy of the Joint Statement dated January 17, 2001, is attached hereto as Exhibit 8. The purpose of the Statement is to achieve legal closure and all-embracing and enduring legal peace with respect to all claims related to the Nazi era or World War II against Austria and/or Austrian companies, as defined in Annex B to the Statement (which definition includes the Austrian Gallery). To that end a General Settlement Fund will be established and funded by Austria, and it shall be the exclusive forum for all claims except those falling within the above-mentioned Reconciliation Fund. Only in rem claims for works of art are expressly excluded from participating in the General Settlement Fund; they are addressed in Annex A §5 to the Statement, which sets forth that art restitution will proceed on an expedited basis pursuant to the Austrian Federal Law of December 4, 1998, which I have mentioned supra. This most recent Joint Statement shows, in my view, that a) all claims relating to works of art other than in rem claims are exclusively to be brought before the General Settlement Fund and b) in rem claims for works of art are properly before the Austrian Federal Minister for Education and Cultural Affairs (whose correct title as of February 1, 2000, is Federal Minister for Education, Science

and Culture) and her advisory board under the 1998 Statute. The Joint Statement confirms my opinion US courts should not review decisions made by the competent Austrian authorities under the 1998 Statute.

III. ASPECTS OF THE AUSTRIAN COURT SYSTEM

A. *Independence of the Judiciary from the Executive Branch of the Government*

29. According to Art. 94 of the Austrian Constitution (B-VG), judicial and administrative powers are separate at all levels of proceedings. Judges are independent in the exercise of their judicial office (Art 87 B-VG). No one may be deprived of his lawful judge (Art 83). The law on the organization of the courts prescribes an age limit (presently 65 years) upon whose attainment judges retire automatically. Otherwise there is no time limit for the tenure of their office and they may be removed only in the cases and ways prescribed by law and by a formal judicial decision (Art. 88). Hearings in civil and criminal cases are oral and public (Art 90). According to those provisions of the Constitution and to my knowledge and experience, the Austrian courts enjoy sufficient freedom from the executive branch of the government to enable them to act independently. The Austrian courts, most prominently among them the OGH, have always guarded their independence vigorously and rendered numerous decisions against the executive branch. In my view, they would be able to independently find facts and decide Plaintiff's claims in strict accordance with the applicable law.

B. *Enforcement of Foreign Judgments*

30. Austrian courts must not enforce judgments of courts sitting outside the European Union, unless the contrary is provided for in a bi- or multilateral treaty. I have therefore every reason to believe that a decision of a United States court in the captioned matter will not be enforceable in Austria.

IV. THE COURT FEES IMPOSED BY THE AUSTRIAN COURT APPLY TO ALL CIVIL LITIGATIONS AND PLAINTIFF WAS GRANTED SIGNIFICANT LEGAL AID BY THE AUSTRIAN COURT

31. Finally, I have been asked to explain Austrian procedural rules to the extent that they speak to the formula employed by the Austrian court to decide the petition of Ms. Altmann and several other claimants for legal aid in connection with their proceedings before the Austrian courts.

A. *Formula for Court Fees*

32. Generally, lawsuits in Austria are commenced by filing a complaint in court and paying the requested court fees. The court fees are calculated according to a standard formula based on the amount in controversy claimed by the plaintiff. The standard formula used to calculate the court fees is 1.2 percent of the amount in controversy plus 13,180 Austrian Schilling. The amount of the required court fees is entirely dependent upon the amount in controversy claimed by the plaintiff. A true and correct copy of the relevant provisions of the Austrian Statute on Court Fees, together with a certified English translation, is attached hereto as Exhibit 9.

Appendix 1

33. In this case, Dr. Stefan Gulner, Ms. Altmann's attorney in Austria, filed a petition for legal aid for Ms. Altmann, as well as for the other family members who participated in that proceeding, George Bentley and Trevor Mantle. A true and correct copy of Dr. Gulner's petition for legal aid, together with a certified English translation, is attached hereto as Exhibit 10. According to the petition for legal aid filed by the plaintiffs, the amount in controversy was 2 billion Austrian Schilling (or approximately $135 million).[1] As such, the amount of court fees that would normally apply under the standard formula is more than 24 million Austrian Schilling (or $1.6 million).

B. *Legal Aid Granted in Austria*

34. The Austrian Code of Civil Procedure (ZPO) provides for legal aid in certain circumstances. A true and correct copy of the relevant legal aid provisions of the ZPO, together with a certified English translation, is attached hereto as Exhibit 11. In most cases, this possibility is used by parties who cannot afford an attorney because the ZPO mandates that parties have legal representation in the higher courts. In such cases the prospective plaintiff may bring his petition for legal aid before the commencement of a suit. As soon as the attorney appointed to represent the legally-aided plaintiff files the complaint, the court serves its legal aid decision on the defendant concurrently with the complaint. See Austrian Code of Civil Procedure, Section 65.

1. The current exchange rate is 14.7 Austrian schillings per U.S. dollar. *See* http://pacific.commerce.ubc.ca/xr/today.html.

Appendix 1

35. Upon Dr. Gulner's petition, Ms. Altmann, Mr. Bentley, and Mr. Mantle were granted significant financial aid. On November 2, 1999, the Provincial Court for Civil Law Matters in Vienna found that, in light of the income and assets at the disposal of the plaintiffs, and the amount in controversy claimed by the plaintiffs of 2 billion Austrian Schilling, plaintiffs' "necessary maintenance"[2] would be impaired by the imposition of court fees under the usual formula. The court accordingly granted legal aid in the amount of more than 19,000,000 Austrian Schilling, requiring Ms. Altmann to pay a reduced court fee of 2 million Schilling (approximately $135,000). See Decision of the Provincial Court for Civil Law Matters dated November 2, 1999, a true and correct copy of which, together with a certified English translation, is attached hereto as Exhibit 12. The judge in Vienna even dispensed with two defects of the petition: the formal requirement that in their case, as the plaintiffs were already represented by an attorney, the petition should have been brought together with the complaint, not just a draft, and the fact that none of the three forms submitted stated to which extent legal aid was asked for. Furthermore, the judge did not require the petitioners to supply documentation supporting the statements made in the forms.

36. According to the application for legal aid and the court's decision, Ms. Altmann's assets alone (not including her West Los Angeles home which was purchased for approximately 900,000 Austrian Schilling or $60,000 at the

2. "Necessary maintenance" is defined by Austrian statute as "the amount of maintenance that the party requires for itself and its family, for which it has to care, in order to maintain a simple living standard." Austrian Code of Civil Procedure § 63(1).

Appendix I

current exchange rate and was paid in full in 1975)[3] total more than $240,000.

37. Although they had the legal right to do so, Ms. Altmann, Mr. Bentley, and Mr. Mantle did not appeal the legal aid decision. Moreover, they could have applied for an extension of the term of payment of the court fees, claiming that prompt payment would constitute a special hardship.

38. The office of the attorneys for the Republic of Austria, the Finanzprokuratur, is legally bound to file an appeal if it determines that there was an error in the procedure and in the application of the legal aid statutes. In this case, the Finanzprokuratur filed an appeal and argued that plaintiffs' petitions were inaccurate because they failed to declare that plaintiffs had received various art objects worth at least 10 million Austrian Schilling (almost $700,000) prior to the filing of their legal aid petition. The Court of Appeals rejected the Finanzprokuratur's appeal, but only as untimely because the Finanzprokuratur had not yet been served with the complaint. See Decision of the Court of Appeals dated April 14, 2000, a true and correct copy of which, together with a certified English translation, is attached hereto as Exhibit 13.

39. Although each party must advance its own costs and the plaintiff must post the court fees, the Austrian court will determine allocation of costs as part of its judgment. Under the Austrian Code of Civil Procedure, the prevailing

3. Notably, Ms. Altmann did not list the most recent taxable assessment unit value of her home in her application for legal aid.

Appendix I

party is entitled to both his or her attorney's fees and the court's fees. Attached hereto as Exhibit 14 are the relevant portions of the ZPO, together with a certified English translation. Thus, in the event they prevailed in their action in Austria, Ms. Altmann and the other family members would be entitled to recover all of the court fees and their attorney's fees as part of the final judgment.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February ___, 2001 in Vienna, Austria.

Dr. Walter Friedrich

APPENDIX J — EXHIBIT 1 TO DECLARATION OF DR. WALTER FRIEDRICH DATED FEBRUARY 1, 2000

Walter Friedrich, JD
Attorney-at-Law (admitted in Austria)
Rudolfsplatz 12/18, A-1010 Vienna, AUSTRIA
Tel: (431) 535 61 15, Fax: (431) 533 58 63-24

Date of Birth: July 20, 1952
Place of Birth: Vienna, Austria
Citizenship: Austrian

Education: 1975: Juris Doctor, University of Vienna, Austria.

Professional Standing:
1978: passed Austrian Judge's Examination
1978: appointment as a judge;
1989: certification passed Austrian Bar Examination.

Positions:
1975 – 1978:
law clerk to various Austrian courts

1978 – 1981:
judge of district courts.

1981 – 1991:
judge, Documentation Centre of the Supreme Court of Austria.

1991 – to date:
private practice, specializing in international business law and estates.

Appendix J

Special Project: 1987 – 1988:
US Library of Congress: research project commissioned by the Austrian Government to study the US Constitution.

Expert Witness On Austrian Law:

– Plasmapharm Sera GmbH & Co KG v. Marvic, Inc., Marvic Interpharma, Inc. and Maria V. Cancino, United States District Court, Middle District of Florida, Tampa Division, Case No. 86-1377-CIV-T-21C.

– Besicorp Group, Inc. v. Solkav Solartechnik GmbH, American Arbitration Association, New York, NY, 13 T 133 00772/91

– Rashi Textiles U.S.A., Inc. v. Rhomberg Textil GmbH, 857 F.Supp. 1051 (S.D.N.Y. 1994)

– Ing. Hoschek Autoverleih GmbH v. Balag, Ltd., Sasha Muniak, Car-Pol Leasing Ltd., 16 East 48th Street Corp. and Services Mangia, Inc., Supreme Court of the State of New York, County of New York, Index No. 95/100381

Appendix J

– United States of America v. Portrait of Wally, a Painting by Egon Schiele, United States District Court, Southern District of New York, 99 Civ. 9940 (MBM)

Admission: United States District Court, Southern District of New York, Pro Hac Vice: Vossen Frottier GmbH v. Milos Marketing, Inc. et al., 93 Civ. 2823 (RSW)

APPENDIX K — DECLARATION OF DR. STEFAN GULNER DATED FEBRUARY 20, 2001

E. Randol Schoenberg (State Bar No. 155281)
Law Offices of E. Randol Schoenberg
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Attorney for Plaintiff
MARIA V. ALTMANN

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 00-08913 FMC AIJx
[The Honorable Florence-Marie Cooper]

MARIA V. ALTMANN, an individual,

Plaintiff,

v.

REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY, an agency of the REPUBLIC OF AUSTRIA,

Defendants.

Appendix K

DECLARATION OF DR. STEFAN GULNER IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)

[Filed concurrently with Memorandum of Points and Authorities and Declaration of E. Randol Schoenberg]

Hon. Florence-Marie Cooper
Crtrm. 750 Roybal Bldg
Date: March 19, 2001
Time: 10:00 a.m.

I, Dr. Stefan Gulner, attorney at law, Lugeck 7, Vienna A-1010 Austria, declare as follows:

1. Since 1988 I am an attorney in Vienna, Austria. I obtained my doctoral degree in 1983 from the University of Law of Vienna.

2. Since August, 1999 I have represented the plaintiff Maria Altmann, who authorized me to represent her in her efforts to obtain restitution of six paintings by Gustav Klimt that are the subject of the present action.

3. I have personal knowledge of the facts set forth herein and if called upon to testify I could testify competently to these facts.

4. In October, 1999 I took the initial legal steps in Austria to prosecute Mrs. Altmann's legal right to restitution of the six Klimt paintings.

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5. Regarding the expense of court costs that must be deposited at the beginning of a legal process in Austria, allow me to state the following: I agree with Dr. Walter Friedrich, that in Austria the court costs must be deposited upon the filing of the complaint. The amount of the court costs is based on the amount of the given value in dispute (Streitwert).

6. In the case of a complaint for restitution of property, in this case the Klimt paintings, it is allowed in Austria to declare a value in dispute that is independent of the value of the property. If the defendant does not object to the amount of the declared value in dispute, the given value in dispute in the complaint is binding and court costs are measured from that value. However, if the defendant objects, the Court may raise the value in dispute and adjust the court costs accordingly.

7. For the proceeding in the court of first instance, the amount of the court costs to be deposited is 1.2% of the value in dispute, for the proceeding in the second instance 1.8%, and for the proceeding before the Supreme Court 2.4%.

8. The paintings in dispute have an estimated value of $150 million. In the event the complaint would use this as the value in dispute, or if the value in dispute were raised to this amount on the basis of an objection by the defendant (Republic of Austria), it would not be possible for Mrs. Altmann to pay the required amount in court costs from her own property. Indeed, even the payment of a much smaller amount would be beyond her means and would endanger her economic existence.

9. For this reason I filed an application to obtain litigation assistance (Verfahrenshilfe) in the County Court for Civil Law (Landesgericht für Zivilrechtssachen), attaching the complaint and an asset declaration of Mrs. Altmann, copies of which are attached to Dr. Friedrich's declaration as Exhibits 7 and 10, respectively.

10. In her application for litigation assistance, Mrs. Altmann set forth all of her assets and property. Mainly this was made up of her house, some savings worth several thousand dollars, and two certificates of deposit that totaled $200,000 in value, at this time worth approximately 2 million Austrian Schilling at the prevailing exchange rate of 10:1.

11. Because of difficulties caused by the Austrian bureaucracy, at the time of her application Mrs. Altmann had not yet received several drawings and porcelain settings that had been promised to her already months earlier, so that these items could not be included in Mrs. Altmann's asset declaration.

12. With the decision of the County Court for Civil Law on November 2, 1999, Mrs. Altmann's application for litigation assistance was approved. However, the Court stated that Mrs. Altmann would have to deposit 2 million Schilling in court costs (at the time equal to $200,000). The rest of the amount would be preliminarily waived. The Court held that Mrs. Altmann's savings could not be spared at the expense of her obligation to pay court costs.

13. With the application for litigation assistance the Court was required to examine the likelihood of success of

the accompanying complaint, and it was determined that in any case the complaint could not at the outset be qualified as frivolous or obviously meritless.

14. Against my expectations the Republic of Austria filed an appeal on December 13, 1999 against the decision of the court, and in this appeal stated that the recently restituted porcelain and drawings had to be considered with regard to the amount of the court costs required from Mrs. Altmann. In addition, the Republic of Austria argued that a claim could be made as a matter of principle to her other property (capital property, real estate).

15. The Attorney General further argued in its appeal that Mrs. Altmann should not receive any litigation assistance, because absent reciprocity with the United States it would be impermissible. The Attorney General, as representative of the Republic of Austria, for this reason also requested that any litigation assistance, i.e. the partial waiver of court costs, should be completely refused.

16. With the appeal of the litigation assistance ruling pending, and facing already an impossible 2 million Schilling payment in order to institute her lawsuit, Mrs. Altmann and I agreed that I would try to obtain a stipulation from the Austrian Attorney General (Finanzprokuratur) that would set the value in dispute at 660,000 Schilling. This amount would lead to costs that were bearable for Mrs. Altmann and in any case would be required as minimum amounts necessary for litigation in the high courts in Austria.

17. In Austria, the statute of limitations is no more than 30 years. For this reason, different legal claims that would be available to Mrs. Altmann (e.g. challenging a testament on the grounds of mistake, restitution of looted property, etc.) are no longer possible in Austria. Without an agreement to waive the statute of limitations, it is very unlikely that any such claims could be made successfully in an Austrian court. Therefore, in order to proceed in Austria it was necessary to obtain a waiver of the statute of limitations.

18. Because the federal minister for education and culture who is responsible for this matter, Elisabeth Geher, wrote to my colleague E. Randol Schoenberg on July 12, 1999 that his client should seek her remedy in court, I was under the impression that the Republic of Austria wanted in any case a clarification from an Austrian court of the disputed legal issues in this case. I was therefore confident that the Republic of Austria would not play out its economic might against Mrs. Altmann and would waive any statute of limitations defense.

19. Therefore, independent of the appeal of the decision on litigation assistance, on February 18, 2000 I wrote to the Republic of Austria and sought an agreement to set the value in dispute at 660,000 Schilling and to waive application of the statute of limitations.

20. Despite my repeated requests, this letter has remained to this day unanswered by the Attorney General, as representative of the Republic of Austria. Minister Gehrer, to whom I also sent a copy of my letter, answered simply in a letter from March 31, 2000 that she could not give

instructions to the Attorney General. This response by Minister Gehrer is incorrect, because naturally the Attorney General as lawyer of the state, is bound – like any attorney — by the instructions of his client, in this case Minister Gehrer, as representative of the Republic of Austria.

21. On April 14, 2000 the Appellate Court in Vienna, in the second instance, rejected the appeal of the award of litigation assistance as invalid. According to the holding of the Appellate Court, service of a ruling on litigation assistance on the opponent (Repubic of Austria) is invalid, as long as the complaint has not been brought. In this way it should be prevented that the defendant obtains knowledge of the complaint already before it has been filed. For this reason the Appellate Court in Vienna did not address the grounds for appeal raised by the Republic of Austria.

22. Had the Republic of Austria's argument on appeal been considered, Mrs. Altmann also would most likely at the very least have been required to sell the porcelain and drawings she finally received after applying for litigation assistance, and deposit the proceeds as court costs. Had the Republic of Austria's arguments been completely successful, Mrs. Altmann would have been denied all litigation assistance. Based on a value in dispute of $150 million, the court costs for the court in the first instance would total 24 million Schilling, far more than Mrs. Altmann's total assets even including the value of the drawings and porcelain she received.

23. Further, in the event Mrs. Altmann were to lose her case, there was also the danger that the Republic of Austria,

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independent of the approval of litigation assistance, could seek to recover all of its litigation expenses, including attorney's fees. This also posed a danger that Mrs. Altmann would be reduced by an adverse judgment to a minimum level of existence.

24. Because a woman of the age of 84 (now 85) should not take the risk of losing her house and all her assets and income, under these circumstances I could not advise Mrs. Altmann to file her complaint in Austria.

25. There are different formal grounds (procedural and jurisdictional) that the Republic of Austria could try to use against the complaint if it were filed in Austria. Among others the Republic of Austria could claim that under the 1998 Restitution law there is no possibility of filing a complaint against the Republic of Austria. However, in my opinion, the proceedings that transpired to date before the advisory board (Beirat) did not entail a "fair trial" because the parties are not allowed to participate. Therefore, Minister Gehrer was not required to accept the recommendation of the advisory board as a basis for her decision not to return the Klimt paintings.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed by me in Vienna, Austria on February __, 2001.

_____

Dr. Stefan Gulner

APPENDIX L — EXHIBIT G TO THE DECLARATION OF E. RANDOL SCHOENBERG IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)

January 17, 2001

Stuart E. Eizenstat
Deputy Secretary of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, DC 20220

Dear Deputy Secretary Eizenstat,

This is to confirm that the Exchange of Notes concerning the establishment of the General Settlement Fund, the Joint Statement of January 17, 2001, and any provisions concerning "legal closure" therein, shall not affect or pertain to the matter of *Maria Altman[n] v. Republic of Austria et al.*, currently pending before the United States District Court for the Southern [sic] District of California, because it is a matter of art restitution under the Austrian law. The United States Government has indicated to the Austrian Federal Government that it will not file a Statement of Interest in the above matter.

Sincerely,

Hans Winkler
Legal Adviser
Austrian Federal Ministry for Foreign Affairs

APPENDIX M — SUPPLEMENTAL DECLARATION OF DR. WALTER FRIEDRICH DATED MARCH 9, 2001

SCOTT P. COOPER (State Bar No. 96905)
JONATHAN E. RICH (State Bar No. 187386)
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Attorneys for Defendants REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 00-08913 FMC (AIJx)
[The Honorable Florence-Marie Cooper]

MARIA V. ALTMANN, an individual

Plaintiff,

v.

REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY, an agency of the REPUBLIC OF AUSTRIA,

Defendants.

Appendix M

SUPPLEMENTAL DECLARATION OF DR. WALTER FRIEDRICH IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

DATE: March 19, 2001
TIME: 10:00 a.m.
CTRM: 750, Roybal Federal Building
255 E. Temple Street
Los Angeles, CA 90012

Complaint Filed: August 22, 2000

SUPPLEMENTAL DECLARATION OF DR. WALTER FRIEDRICH

I, Dr. Walter Friedrich, declare as follows:

1. I make this Declaration at the request of the attorneys for defendants the Republic of Austria, a foreign state, and the Austrian Gallery (collectively, "Defendants") in support of Defendant's Reply Memorandum of Points and Authorities in Support of Motion to Dismiss Under Fed. R. Civ. P. 12(b). I make this Declaration based upon my own personal knowledge and research.

2. A 30-year statute of limitations generally applies to civil claims in Austria. General Civil Code of Austria (ABGB) sections 1478-1479. Under Austrian law, acts of fraudulent concealment within that period toll the 30-year statute of limitations.

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3. The 30-year statute of limitations, which bars causes of action based on events that occurred more than 30 years ago, does not prevent Plaintiff from basing her claims on the 1998 Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections. As I stated in my Declaration filed in support of Defendants' Motion, that legislation authorizes the Minister of Finance to return artworks in special instances enumerated in the Statute where claims could otherwise not be made because, for example, the applicable statute of limitations would bar those claims.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and was executed this ____ day of March, 2001 at Vienna, Austria.

_____

Dr. Walter Friedrich